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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6891

ARNOLD FAIRBANK, an individual d/b/a ARNOLD FAIRBANK CATTLE COMPANY, and ARNOLD FAIRBANK CATTLE CO., INC., a California corporation,
Petitioners,

v.

CLIFFORD M. HARDIN, Secretary, United States Department of Agriculture and UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on May 8, 1970. A petition for rehearing was timely filed on June 1, 1970, and denied on June 17, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on May 8, 1970, and a copy thereof is appended to this petition in the appendix at p. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 par(1).

THE QUESTIONS PRESENTED

1. The finding and conclusion that Fairbank violated the Act was based upon the testimony of government employees, Watkins and Sherman. The testimony was based solely upon their review and evaluation of the entire contents of an investigative report containing a substantial amount of information purporting to be factual gathered from third persons which information was not within the personal knowledge of such witnesses. Upon the receipt of such testimony, was the refusal to produce the entire investigative report at Fairbank's request for purposes of cross-examination of such witnesses a denial of due process?

2. Was there a denial of due process where government witnesses admitted, after the record was closed, they had testified falsely, and with knowledge of the perjury, the government took no steps to correct the record, and the false testimony was offered and received over objection to support a finding that the cattle shipped by Fairbank from Texarkana were the identical cattle received by the buyers of such cattle in California and Arizona as itemized in the complaint, which finding was essential to support the

decision that Fairbank violated section 312(a) of the Packers and Stockyards Act as charged in the complaint?

3. Was there substantial evidence to support the decision and order of the Judicial Officer that Fairbank sold cattle on false weights in California and Arizona?

4. Was Fairbank entitled to be heard upon the validity and the application of regulations under the Act which the government applied to his transactions at country points which were not posted stockyards in view of the fact that the regulations were promulgated following extended public hearings as to weighing practices at posted stockyards at a time before Congress extended the Act to country livestock transactions?

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

This case involves:

1. The Fifth Amendment to the Constitution of the United States which provides in part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

2. Section 312 (a) of the Packers and Stockyards Act (42 Stat. 167, 7 U.S.C. sec. 213 (a)), which until its amendment on September 2, 1958, provided as follows:

> "(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock."

3. Section 312 (a) of the Packers and Stockyards Act, as amended by the Act of September 2, 1958, Pub. L. 85-909, sec. 2(5), (72 Stat. 1750, 7 U.S.C., sec. 213 (a)), which provides as follows:

> "(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of live stock."

4. 5 U.S.C., sections 555 (d) and 555 (e) (80 Stat. 385), which provide as follows:

> "(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.
>
> "(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 385.)"

5. Sections 201.46, 201.49, and 201.55 of the Regulations under the Packers and Stockyards Act (9 CFR, sec. 201.46, 201.49, and 201.55), which appear in the appendix at pp. 9a-11a.

6. Subsections (a) and (b) of section 202.13 of the Rules of Practice governing proceedings under the Packers and Stockyards Act (9 CFR, sec. 202.13 (a) and 202.13 (b)) which provide as follows:

> "(a) *Issuance of subpenas.* The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpena, be required at any designated place of hearing. Subpenas may be issued by the Secretary or by the examiner, under the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity, and reasonable scope thereof.
>
> "(b) *Application for subpena duces tecum.* Subpenas for the production of documentary evidence, unless issued by the examiner upon his own motion, shall be issued only upon a verified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, and materiality and the necessity for their production."

STATEMENT

Arnold Fairbank, d b a Arnold Fairbank Cattle Company, and the Arnold Fairbank Cattle Co., Inc., a corporation which succeeded to Fairbank's business, hereinafter referred to as Fairbank, filed a petition in the United States Court of Appeals for the Ninth Circuit to obtain a review of the decision of the Judicial Officer in the United States Department of Agriculture. The decision was issued under the Pack-

ers and Stockyards Act (7 U.S.C. sec. 181 *et seq.*). Fairbank at all times herein was a registered "dealer" under the Act engaged in the business of buying and selling cattle in commerce.

The administrative proceeding in the Department of Agriculture was initiated by a complaint filed on April 28, 1966 by the Director of the Packers and Stockyards Division, Consumer and Marketing Service (presently the Packers and Stockyards Administration), hereinafter referred to as the government, following an audit and investigation of Fairbank's operations as a country livestock dealer in 1965. The complaint itemized 54 transactions and alleged that in each transaction Fairbank purchased a stated number of cattle in Texas at a stated weight and sold and delivered the identical cattle to buyers in California and Arizona at an arbitrarily increased weight and that in so doing Fairbank willfully violated 7 U.S.C. sections 213 (a) and 221 and Regulations 9 CFR sections 201.46, 201.49, and 201.55.

Fairbank filed a petition with the Secretary of Agriculture (set forth in appendix pp. 11a-14a) requesting the amendment, repeal or revision of sections 201.46, 201.49 and 201.55 (9 CFR 201.46, 201.49 and 201.55) of the regulations under the Act to adapt said regulations to country transactions. The petition was denied by letter (set forth in appendix pp. 14a-15a).

Prior to the hearing, Fairbank filed a preliminary motion (set forth in appendix pp. 16a-18a) to inspect and copy evidentiary and impeachment material in the hands of the government including the entire investigative report prepared by the government investigators of Fairbank's operations. This motion was

denied, whereupon Fairbank filed an affidavit with the Hearing Examiner and moved for the issuance of a subpoena duces tecum for the production of such evidentiary and impeachment material which was denied. TR 463, 466, Respondent's Exhibit 3 for Identification.

Fairbank also filed a motion for a declaratory order (set forth in appendix pp. 18a-19a) to declare sections 201.46, 201.49 and 201.55 of the said regulations illegal and void as to country livestock transactions. This motion was denied. Fairbank filed his answer on September 8, 1966 denying that he had willfully violated the Act.

Hearings were held in El Centro, California, November 29 through December 2, 1966, and June 28 and June 29, 1967 before Jack W. Bain, Hearing Examiner, United States Department of Agriculture.

The government called as its witnesses, its employees, Watkins, Williams, Cortez and Sherman; also buyers of Fairbank's cattle in the transactions complained of, Wilkinson, Abbott, Reyes, Delfino, Williams, Stone, Jack Hannon, Skoog, Stafford Hannon and Torrence; operators of rest stops where Fairbank's cattle were unloaded for feed, water and rest during transit, Manning, Headstream, Ruebush, and Parsley. Fairbank called on his behalf K. J. Smith, Jr. in charge of all of his trucking, Rentel, Smith's principal driver, and his bookkeeper Hudson. On June 28 and 29, 1967, at a second stage of the hearing, over the objection of Fairbank, truckers Paris, Icke, Taylor, Dagley and Lammer were called as witnesses for the government.

Government employees Watkins and Sherman testified they had access to the entire investigative report

and it was their opinion, based upon the investigative report, that Fairbank had violated the Act as charged in the complaint. Tr 38, 50, 124, 150, 179-182, 228, 877-884. The Hearing Examiner received such testimony in evidence over objections but refused to require the production of that report for cross-examination of government witnesses. Tr 16-18, 173, 187, 207-208, 292, 294, 877, 880, 888, 1043-1047.

All the buyers called by the government testified they always weighed the cattle off-truck at their feed yards, and subsequently compared the off-truck weight with Fairbank's invoice weight, and based on their own rule that the "shrink" (the difference between the invoice weight and the off-truck weight) could not exceed 10% of the invoice weight, either accepted the cattle, requested adjustments in weight or price, or rejected the cattle, and no payments were made until all elements, including weight, fully met their approval. Tr 330-341, 362-365, 391-393, 399, 405, 410-414, 417, 418, 424, 434-444, 509-511, 545-556, 587, 588, 590, 600, 603.

The rest stop operators testified that Fairbank's cattle were carefully fed and watered at the rest stops and that the cattle would gain in weight with such feed and care, that Fairbank kept replacement cattle at the rest stops on feed and water and that Fairbank and his representatives could and did sort and exchange cattle at the rest stops, Tr 461, 516-526, 532, and their testimony was fully corroborated by testimony from Fairbank's witnesses, Smith and Rentel. Tr 650-665, 727-817.

Hudson testified he was experienced in cattle transactions and it was impossible for Watkins to correlate the purchase transactions with the re-sale transac-

tions because cattle were exchanged or added to shape up the loads to meet the buyer's approval. Tr 689-725.

Smith and Rentel testified that Fairbank's buyers were well pleased with their purchases, that Fairbank did not represent to the buyers he was selling them cattle based on his purchase weights, and that there was nothing unfair or deceptive and no one was dissatisfied with the transactions. Tr 650-665, 727-817. They also testified that at various stopping points during the transit of the cattle between Texarkana and the ultimate destinations in California and Arizona Fairbank maintained facilities whereby the individual cattle in particular loads in transit could be and in fact were from time to time sorted and changed with a view to better satisfying the buyer's desire.

The government stated that it was surprised by this testimony and called five truckers who testified, Tr 916-1200, they had driven the trucks transporting some of the loads itemized in the complaint and identified certain logs.

Immediately following the close of the hearing, the five truckers called as witnesses for the government joined Fairbank, his counsel and K. J. Smith, Jr., the principal trucker for Fairbank, for lunch. At that luncheon, one of the witnesses, Dagley, stated that he testified falsely regarding the shipments in that on certain transactions where his name was on the driver's log he was not on the trip, and that his testimony relating to the logs and the loading of the cattle was false. The other truck drivers stated generally they also had given similar false testimony concerning shipments of Fairbank's cattle itemized in the complaint and the logs thereof. Upon returning to the Washington, D. C., area, counsel for Fairbank immediately

notified Raymond Fullerton, government counsel, of the perjured testimony who stated he would take steps to correct the record.

Following the hearing, Fairbank filed proposed findings of facts conclusions and order, and objections to the unfair and prejudicial actions of the Hearing Examiner.

At the time of the oral argument before the Judicial Officer the government had taken no steps to correct the record and Fairbank's counsel relayed the facts as to the perjury to the Judicial Officer (Oral Argument pp. 9, 24, 27, 28, 30) who expressed shock and concern but who took no steps to correct the record, and issued his decision and order, based upon the record which contained the perjured testimony of the truckers.

The Judicial Officer on November 1, 1968, found that Fairbank engaged in practices in violation of sections 312 (a) and 401 of the Act (7 U.S.C. secs. 213 (a) and 221) and secs. 201.46 and 201.55 of the regulations (9 CFR secs. 201.46 and 201.55), and issued an order requiring Fairbank to cease and desist from the practices alleged, directing Fairbank to keep records, and suspending Fairbank's registration under the Act for a period of six months. (Set forth in Appendix, pp. 20a-37a.)

Fairbank in connection with the appeal to the Court of Appeals filed a motion (set forth in appendix pp. 38a-41a) pursuant to the provisions of 28 U.S.C. section 2347(c) (as added by Pub.L. 89-554, sec. 4(e), 80 Stat. 623) for leave to adduce additional evidence arising out of the failure of the government to produce the investigative report of Fairbank's operations, to

determine the application of the weighing regulations under the Packers and Stockyards Act to country transactions, and to purge the record of perjury. Said motion was denied by the Court. Prior to argument before the Court, Fairbank filed a motion to produce documents under seal (set forth in appendix pp. 42a-43a) so that all documents requested by Fairbank but which the government refused to produce would be available to the Court for review. The government opposed said motion and Fairbank filed a reply thereto (as set forth in appendix pp. 44a-56a). The Court failed to rule on said motion, and the documents requested were not produced under seal.

The Court of Appeals for the Ninth Circuit, on May 8, 1970, affirmed the administrative order. A timely petition for rehearing was filed by Fairbank on June 1, 1970, and was denied by the Court on June 17, 1970.

REASONS FOR GRANTING THE WRIT

I. The Refusal To Produce the Entire Investigative Report at Fairbank's Request for the Purpose of Cross-Examination of the Government Employees Watkins and Sherman Was a Denial of Due Process

The action taken by the Judicial Officer in this proceeding has seriously injured Fairbank in that it has prevented him from practicing his chosen profession of cattle dealer for a period of six months upon the basis of an erroneous finding and conclusion that he violated the Packers and Stockyards Act. The finding and conclusion that Fairbank violated the Act was based upon the testimony of the government employees, Watkins and Sherman. The testimony of these witnesses was based solely upon their review and evaluation of the entire contents of an investiga-

tive report containing a substantial amount of information purporting to be factual, gathered from third persons, which information was not within the personal knowledge of such witnesses. Upon the receipt of such testimony, the refusal to produce the entire investigative report at Fairbank's request for purposes of cross-examination was a denial of due process. *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951), *Greene* v. *McElroy*, 360 U.S. 474 (1959), *Campbell* v. *United States*, 365 U.S. 85 (1961).

The flat and arbitrary denial of Fairbank's request for the issuance of subpoena duces tecum to produce the entire investigative report resulted in the suppression of evidence or impeachment material by the government which was completely unjustified and in violation of the fair hearing provisions of the Administrative Procedure Act as well as the Rules of Practice under the Packers and Stockyards Act. Section 202.13 of the Department of Agriculture's Rules of Practice (set forth above at p. 5) under the Packers and Stockyards Act provides for "the production of documentary evidence from any place in the United States on behalf of any party to the proceeding", and section 555(d) of Title 5 of the United States Code (set forth above at p. 4) provides that subpoenas "shall be issued to a party upon request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought."

Fairbank diligently sought the production of the evidentiary and impeachment material in the possession of government officials. On all occasions Fairbank's requests were rejected by the Hearing Examiner. This was a gross denial of due process and

a flagrant disregard of the fair hearing requirements established by this Court under Packers and Stockyards Act in the second *Morgan* case. In that case, *Morgan* v. *United States*, 304 U.S. 1, at pp. 14, 15, and 22 (1938), this Court said:

> ". . . in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. . . The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance . . . they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Fairbank was entitled to inspect all investigative reports available to government witnesses Watkins and Sherman touching the events and activities as to which Watkins and Sherman testified at the hearing. *Jencks* v. *U. S.*, 353 U.S. 657, 668 (1957).

The statement in the decision of the Court of Appeals "that petitioners were given every producable (sic) statement, record and document in the possession of the administrative agency, with the exception of certain portions excised by the Hearing Examiner while viewing the material *in camera*" is completely contrary to the fact and without any foundation whatsoever in the record. See Fairbank's Motion to Produce Documents under Seal, set forth in Appendix, pp. 42a-43a; and Fairbank's Reply to the government's opposition to said motion, set forth in Appendix, pp. 44a-56a.

II. The Failure of the Government To Correct the Record Where Its Own Witnesses Testified Falsely Was a Denial of Due Process to Fairbank

There was a denial of due process where government witnesses admitted, after the record was closed, they had testified falsely, (see affidavits set forth in Appendix at pp. 57a-60a), and with knowledge of the perjury, the government took no steps to correct the record. The false testimony was offered to support a finding that the cattle shipped by Fairbank from Texarkana were the identical cattle received by the buyers of such cattle in California and Arizona as itemized in the complaint, which finding was essential to support the decision that Fairbank violated Section 312 (a) of the Packers and Stockyards Act as charged in the complaint.

Prior to the recommended decision of the Hearing Examiner, counsel for the government had knowledge of and was fully advised that four truckers called by the government admitted they testified falsely. Such truckers were called by the government to trace through the identical loads of cattle from Texarkana to California. The government alleged in the complaint that the identical cattle purchased in Texarkana were resold in California. The truckers testified they accompanied certain of the shipments of Fairbank's cattle, itemized in the complaint, from Texarkana to points of destination in California and Arizona and that the cattle delivered at such points of destination were the identical cattle which had been loaded in Texarkana. Tr. Paris 911-1018, Ickes 1019-1061, Dagley 1110-1169, Laumer 1170-1203. The finding of the Judicial Officer that Fairbank violated the Act was dependent upon the finding that the cattle loaded in Texarkana were the identical cattle delivered in California and Arizona.

Watkins' testimony correlating the cattle purchased with the cattle sold was based solely upon the head count being the same. Tr 81-87, 264. He had no knowledge of the actual movement of the cattle. Fairbank's witnesses, Rentel and Smith, testified the cattle were sorted enroute and the cattle delivered were not the identical cattle loaded at Texarkana. There was no substantial evidence in the record that the cattle were identical.

The government with full knowledge of such false testimony, which went to a most important issue, the identification of the cattle enroute in the questioned transactions, did not advise the Hearing Examiner of the perjured testimony, but when Fairbank's counsel called it to the attention of the Judicial Officer at the oral argument, government counsel admitted he had been informed of the perjury. Having been fully advised, counsel for the government had a public duty to correct a perjured record his witnesses had created. Also, the Judicial Officer of the Department of Agriculture had a duty to take the necessary steps to correct the record and to purge the record of perjury before rendering his decision and order. Both of the said government officials failed in their duty in this respect. This perjury constituted falsehood on a material point. Where a party speaks to a fact and it is a deliberate falsehood, courts of justice under such circumstances are bound, upon principles of law, morality and justice to apply the maxim "falsus in uno, falsus in omnibus". *The Santissima Trinidad and The St. Ander*, 7 Wheat. (20 U.S.) 283 at p. 339, 5 L ed 454 (1822). Fairbank and his counsel filed affidavits with the Court of Appeals and requested leave to adduce additional evidence and correct the perjured testimony.

(See Appendix pp. 38a-41a and 57a-60a.) This was denied by the Court of Appeals and the decision and order of the Judicial Officer which was affirmed by the Court of Appeals still is based upon perjured testimony. This is a denial of due process to Fairbank under the Fifth Amendment to the Constitution of the United States. *Communist Party* v. *Subversive Activities Con. Bd.*, 351 U.S. 115 (1956).

III. There Was No Substantial Evidence To Support the Judicial Officer's Decision That Fairbank Violated Section 312 (a) of the Packers and Stockyards Act

There was no substantial evidence to support the decision and order of the Judicial Officer that Fairbank sold cattle on false weights in California and Arizona.

The Judicial Officer found that Fairbank contracted to sell the cattle on his purchase weight in Texarkana, that he sold the cattle in California at false and incorrect weights, and thereby deceived and defrauded his customers. The buyers who were called as government witnesses all testified to the contrary. All the buyers testified that the questioned transactions were purchases on approval, with guaranteed delivery and shrinkage not to exceed ten per cent (10%) of the invoice weight, that off-truck weight was the basis for their purchase, and that the invoice weight and amount was adjusted to their satisfaction if the shrink exceeded 10%. The buyers testified that the cattle in all transactions were weighed by them in California and Arizona on their scales, and the weights were recorded (Tr Wilkinson, 329-336; Abbott 364; Reyes 392; Delfino 405, 410; Williams 427-428; Stone 434-435; 440-444; Jack Hannon 509; Skoog 545-546). The buyers also testified that they relied on their off-truck weight

and compared it to Fairbank's invoice weight, and determined it was a reasonable weight prior to payment (Tr Wilkinson 330-331; Abbott 364; Reyes 392; Delfino 410; Stone 444; Jack Hannon 509-510; Skoog 545). The buyers further testified that if adjustments were required in the invoice weight, Fairbank approved the adjustment or there was no sale (Tr Wilkinson 341; Abbott 364; Reyes 392-393; Delfino 410, 417; Williams 427; Stone 435-439), and unless all factors, including the weight, were satisfactory to the buyer, the buyer did not accept the cattle (Tr Wilkinson 330, 336-337; Abbott 363, 364; Reyes 393; Delfino 411; Torrence 603). In sum, the buyers testified they did not pay for the cattle until the cattle were (a) received by the buyers, (b) inspected by the buyers, (c) weighed by the buyers, and (d) approved by the buyers. (Tr Wilkinson 330-332, 336-340; Abbott 362-365; Reyes 391-399; Delfino 409-411, 417-418; Stone 434-444; Skoog 545-550; Stafford Hannon 587-588, 590; Torrence 600-603). The buyers' testimony was corroborated by Fairbank's witnesses, Rentel and Smith (Tr 663-665, 751-753).

The finding of the Judicial Officer was based entirely upon the testimony of government employees. These witnesses had no personal knowledge of the transactions and their testimony was predicated on the following assumptions, none of which are supported by the evidence: (a) that Fairbank made false representations to and deceived the buyers with respect to the transactions; (b) that the cattle loaded in Texarkana were the identical cattle delivered in California and Arizona; and (c) that it was impossible for the cattle to gain in weight from the time they were bought by Fairbank to the time of their sale and delivery to Fairbank's buyers.

The Judicial Officer's finding as to false weights clearly departs from the accepted and usual course of a judicial proceeding in determining what is and what is not substantial evidence. Fairbank's transactions are labeled false weight transactions when in fact they are accepted, valid country livestock transactions and upon the undisputed facts do not violate the Packers and Stockyards Act or any other moral or unwritten rule or standard in the livestock industry. The decision in this administrative proceeding, stamped with approval by the Court of Appeals, is shocking and should not be condoned by this Court. Administrative Procedure Act, Legislative History, 79th Congress, 2d session, Senate Document 248 at p. 208.

IV. The Failure To Hear Fairbank on the Validity of Sections 201.46, 201.49 and 201.55 of the Regulations Under the Packers and Stockyards Act With Respect to Country Transactions Was a Denial of Due Process

Fairbank was entitled to be heard upon the validity and the application of regulations under the Act which the government attempted to apply to his transactions when the regulations were promulgated following extended public hearings as to weighing practices at posted stockyards before Congress extended the Act to country livestock transactions.

The Packers and Stockyards Act was amended in 1958 (72 Stat 1750) and jurisdiction extended for the first time beyond the greater terminal stockyards to country livestock transactions. The industry and officials in charge of the administration of the Act at that time fully recognized the need for public hearings to fully consider whether the livestock weighing practices in country transactions were in compliance with the Act and whether the provisions of sections 201.46,

201.49 and 201.55 of the regulations should be extended to country transactions. Affidavit of Lee D. Sinclair (set forth in Appendix pp. 60a-63a). Officials in charge of the administration of the Packers and Stockyards Act took no steps to revise or modify or change or reconsider those regulations relating to weighing practices, following the 1958 amendment of the Act. Upon receipt of the complaint, Fairbank petitioned the Secretary of Agriculture to revise and modify said regulations to make the regulations suitable for application to country operations. (See Appendix pp. 11a-14a.) This petition was denied. (See Appendix pp. 14a-15a.) Fairbank in the administrative proceeding filed a motion for a declaratory order as to the validity of said sections of the regulations as applied to country transactions. (See Appendix pp. 18a-19a.) The motion was denied. To deny Fairbank the right to present evidence as to the validity of the above regulations is a complete abandonment of the standards established by the Administrative Procedure Act. Any party has a right to be heard as to the validity of any rule or regulation which affects his business activities in a regulated industry. It was the duty of the Hearing Examiner to hear relevant evidence as to the validity of said regulations and upon such evidence determine if the questioned regulations were valid or invalid as to country transactions. *Board of Trade of City of Chicago* v. *United States*, 246 U.S. 231 (1918). Due to the large volume of livestock transactions at points other than posted stockyards, the question of the validity of the regulations is of great public importance and warrants the granting of a writ of certiorari. *Denver Union Stock Y. Co.* v. *Producers L. M. Ass'n.*, 356 U.S. 282.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,705

ARNOLD FAIRBANK, an individual, d/b/a ARNOLD FAIRBANK CATTLE COMPANY and ARNOLD FAIRBANK CATTLE CO., INC., a California corporation, *Petitioners,*

v.

CLIFFORD M. HARDIN, Secretary, United States Department of Agriculture and UNITED STATES OF AMERICA, *Respondents.*

[May 8, 1970]

On Petition for Review of an Order of the Secretary of Agriculture

Before: BARNES, CARTER and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge:

After a public hearing, held under the provisions of the Packers & Stockyards Act, 7 U.S.C. § 181, et seq., the respondent Secretary[1] found and concluded that Arnold Fairbank, d/b/a Arnold Fairbank Cattle Company, the respondents in the administrative proceeding, willfully violated 7 U.S.C. §§ 213(a) and 221 and Regulations 9 C.F.R. §§ 201.46 and 201.55 by: (1) selling livestock at false weights, (2) issuing invoices to the purchasers showing the false weights, (3) collecting payments from the purchasers on the basis of the false weights, (4) making copies of the false invoices a part of the records of the Arnold Fairbank Cattle Company, (5) failing to keep buyer's invoices regarding all of the purchases of livestock, and (6) failing to keep an accurate record of the weight of livestock bought, sold, or otherwise disposed of each business day.

[1] The Judicial Officer acting for the Secretary.

The order issued in the administrative proceeding requires Fairbank and his successor corporation to cease and desist with respect to the illegal practices, and to keep complete and accurate records in connection with all business transactions which are subject to the statute. The order also provides that Fairbank and Arnold Fairbank Cattle Co., Inc. be suspended as registrants under the Packers & Stockyards Act for a period of six months.

Fairbank was a registered "dealer" under the provisions of the Act during the time in question and was engaged in the business of buying and selling livestock in commerce. He is the sole owner of the corporation, which succeeded him during the administrative proceeding.

Sufficiency of Evidence

The Judicial Officer (Officer) found that, in 59 separate and distinct transactions, Fairbank sold cattle for his own account on a weight basis, in commerce, to various customers in California at false and incorrect weights, which he arrived at by adding an arbitrary number of pounds to the weights at which he had purchased the cattle. Additionally, he found that Fairbank purported, and contracted, to sell the feeder livestock involved on the basis of his purchase weight. He also found that the 59 transactions involved more than 5,000 feeder cattle, which were sold at false weights, that Fairbank arbitrarily added a total of 77,531 pounds to the weights at which he had purchased these cattle and collected an additional $16,814.98 on the basis of false weights. Moreover, he found that Fairbank issued invoices to purchasers showing false weights, collected payments from purchasers on the basis of the false weights, made copies of false invoices a part of the records of his company, failed to keep buyer's invoices regarding all of the purchases of livestock and failed to keep an accurate record of the weight of the livestock bought, sold or otherwise disposed of in each business day.

The record is voluminous and, beyond doubt, supports the findings of the Officer. Petitioners' assertion that the cattle gained weight during the course of transportation borders on the ludicrous and finds no substantial support in the record. The evidence in support of the findings is so overwhelming that to cover it in detail would be a gross misuse of the judicial function.

Under the provisions of the Act, the policing of the "dealers" is placed in the hands of the Secretary of Agriculture and the Officer acting in his stead. The scope of judicial review is narrowly limited to the correction of errors of law and to the examination of the sufficiency of the evidence supporting the factual conclusions. *Aikins* v. *United States*, 282 F.2d 53 (10th Cir. 1960); *Hyatt* v. *United States*, 276 F.2d 308 (10th Cir. 1960); *Swift & Co.* v. *United States*, 393 F.2d 247-255 (7th Cir. 1968). The court must not substitute its judgment for that of the Officer, as to which of various rational but opposed inferences should be drawn from the evidence. *Hyatt* v. *United States, supra; Capitol Packing Co.* v. *United States*, 350 F.2d 67 (10th Cir. 1965). The findings and orders of the Officer must be sustained if not contrary to law and if supported by substantial evidence. *Swift & Co.* v. *United States, supra; Capitol Packing Co.* v. *United States, supra.*

Even if there was a possibility of drawing two inconsistent conclusions from the evidence, it does not mean that an administrative agency's findings are not supported by substantial evidence. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

Evidentiary Questions

Petitioners complain of the receipt in evidence of certain books and records and summaries thereof and of other rulings of the Hearing Examiner.

Keeping in mind that petitioners' registration as a livestock dealer is a privilege granted by the Secretary of

Agriculture, pursuant to the provisions of the Act, *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied* 347 U.S. 1016 (1954), and that a livestock dealer is required to keep records for examination by the officials of the agency, 7 U.S.C. § 221, 9 C.F.R. 201.46, 9 C.F.R. § 201.49,[2] and that the keeping of such records and their inspection, from time to time, are important and essential means in the accomplishment of the purposes of the Act; *Hyatt* v. *United States*, 276 F.2d 308, 312 (10th Cir. 1960); *United States* v. *Donahue Bros.*, 59 F.2d 1019, 1023 (8th Cir. 1932), the audit of petitioners' books and records by respondent Secretary was a proper procedure. Moreover, the receipt in evidence of the products of the audits and the testimony of the auditors in charge was proper and did not constitute error. Of course, the technical rules of evidence, applicable in civil trials, are not employed in administrative hearings. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 706 (1948); *Wallace Corp.* v. *Labor Board*, 323 U.S. 248, 253 (1944). Substantially all of the data used in the summaries which were received in evidence was taken from petitioners' books and records and all of the documents corroborating the data in the summaries, including the documents which did not originate from petitioners' books and records, were separately received in evidence. Consequently, the original records from which the summaries were prepared were available to petitioners and properly received in evidence. *Board of County Commissioners* v. *William J. Howard, Inc.*, 230 F.2d 561, 564 (10th Cir. 1956), *cert. denied* 351 U.S. 926 (1956); *Gross* v. *United States*, 201 F.2d 780, 787 (9th Cir. 1953).

Petitioners complain of alleged erroneous rulings of the Hearing Examiner on the rejection and reception of cer-

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[2] For construction of comparative legislation, see *Davis* v. *United States*, 328 U.S. 582, 587-595 (1946); *Shipiro* v. *United States*, 335 U.S. 1, 33-36 (1948).

tain other evidence. They assert such rulings were consistently against them and demonstrate that the Hearing Examiner was completely unfair to petitioners during the course of the proceedings. We agree with the respondents that the major part of the rejected evidence approached the incredible and none of it had an earmark of inherent veracity as noted in *Sardis Luggage Co. v. National Labor Relations Board*, 234 F.2d 190, 193 (5th Cir. 1956). We are governed by the rule that a Hearing Examiner has wide latitude as to all phases of the conduct of the hearing. *Cella* v. *United States*, *supra*, *cert. denied* 374 U.S. 1016 (1954). Here, as in *Standard Distributors* v. *Federal Trade Commission*, 211 F.2d 7, 11 (2d Cir. 1954), we can say that "the charge of bias and prejudice made against the trial examiner was so unfounded that no discussion of that in detail would serve any useful purpose."

When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); see also *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339 (1952). Neither exception is here applicable. We find no error in the rulings of the Hearing Examiner.

Pre-Trial Discovery

The Packers & Stockyards Act makes no provision for pre-trial discovery and the rules of practice governing proceedings under the act[3] do not provide for discovery. For that matter, this court in *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co.*, 335 F.2d 255, 260 (9th Cir. 1964), in construing comparable legislation held

[3] 9 C.F.R. § 201.1, et seq.

that the failure of Congress to affirmatively authorize discovery should be taken as a deliberate choice and that an agency rule providing for such a procedure would be inconsistent with the general statutory authority under which the agency functioned. That rule, of course, does not mean that prior statements of a witness relating to his testimony should not be produced in the interests of fair play. *Harvey Aluminum (Incorporated)* v. *National Labor Relations Board*, 335 F.2d 749 (9th Cir. 1964). Assuming that petitioners' rights to inspection were the equivalent of those granted to a defendant under the Jencks Act, 18 U.S.C. § 3500, the statements were producable only by a motion after the witness testified, *Johnston* v. *United States*, 260 F.2d 345, 347 (10th Cir. 1958), and then only such portions of the statements as may be related to the testimony of the witness. In those circumstances, it is proper for the Hearing Examiner to view the total statement and then *in camera* ascertain whether it contains non-producable material. *Ogden* v. *United States*, 303 F.2d 724, 739 (9th Cir. 1962).

Aside from the above, we hold that petitioners were given every producable statement, record and document in the possession of the administrative agency, with the exception of certain portions excised by the Hearing Examiner while viewing the material *in camera*. We have examined, *in camera*, the material which was so excised. It does not relate to the subject matter of the testimony of the witness purporting to make the statement. Such being our holding, the excised material was not producable under 18 U.S.C. § 3500 nor, for that matter, under the general principles enunciated in *Jencks* v. *United States*, 353 U.S. 657 (1957).

THE VIOLATIONS WERE WILLFUL

The Officer found that the violations by Fairbank were willful. The fact that he repeatedly sold livestock at false weights points to the unavoidable conclusion that he in-

tentionally violated the provisions of the Act. Additional evidence of willfulness is the fact that the numerous violations were committed over a protracted period of time. Fairbank's issuance of invoices to purchasers showing false weights, his collection of money from purchasers on the basis of false weights, his use of copies of false invoices as part of the record of the company, his failure to keep buyer's invoices regarding all purchases of livestock and failure to keep an accurate record of the weight of the livestock bought, sold or otherwise disposed of have been established by substantial evidence. These multitudinous and repetitious commissions of interrelated violations fully support the Officer's findings that the acts were willful and intentional. *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *Cella* v. *United States*, *supra*; *Capitol Packing Co.* v. *United States*, *supra*.

Petitioners urge that the decision and order of the Officer rests on speculation and conjecture and, as a consequence, is void. We disagree. The administrative decision as to the remedy should be sustained unless the remedy selected has no reasonable relation to the unlawful practices found to exist. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957).

VALIDITY OF ORDER AND REGULATIONS

Although petitioners contend to the contrary, the order of the Officer which suspends the registration of the petitioners is not contrary to the Administrative Procedure Act. *Goodman* v. *Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Capitol Packing Co.* v. *United States*, *supra*. Petitioners contend that 9 C.F.R. §§ 201.46, 201.49 and 201.55 are invalid. However, it is clear that the sanctions imposed by the Officer depend for their validity upon the statute and not the regulations. *United States* v. *Donahue Bros.*, 59 F.2d 1019, 1022 (8th Cir. 1932); *Trunz Pork Stores* v. *Wallace*, 70 F.2d 688, 690 (2d Cir. 1934).

Moreover, we hold that the regulations are valid. Prior to 1958, the Secretary had jurisdiction over transactions involving a dealer only if they took place at a stockyard. In 1958, the phrase "at a stockyard" was deleted from the definition of a dealer and from the prohibitions with respect to trade practices, 7 U.S.C. §§ 201, 213. Clearly, the 1958 amendment of the Act expanded the Secretary's jurisdiction to include jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock, thus authorizing the 1959 amendments to the regulations. The 1959 amendments made the regulations applicable to *all dealer activities* in conection with commerce involving livestock. Obviously, the amendments were promulgated to conform the regulations to the enlarged area of the statutes, 7 U.S.C. §§ 201, 213. We deem it unnecessary to outline the specific steps taken by the Secretary in promulgating the amendments of the regulations. It is enough to say that they were promulgated, amended and published in complete compliance with all applicable requirements.

Specific Findings

Petitioners argue that the Officer's findings of fact 2 through 8 are supported by neither the facts nor the law. We hold that each finding of fact is amply supported by substantial evidence. Moreover, in our opinion, the Officer properly applied the relevant law to each finding, and his order is tailored "to meet the legitimate needs of the case". *Swift & Co.* v. *United States*, 317 F.2d 53, 56 (7th Cir. 1963).

Other issues raised by petitioners have received our consideration. We find them baseless.

The order of the Secretary is affirmed.

UNITED STATES DEPARTMENT OF AGRICULTURE

Regulations of the Secretary of Agriculture Promulgated Under the Packers and Stockyards Act, 1921, as Amended

§ 201.46 *Stockyard owners, market agencies, dealers, and licensees to keep daily record.* (*a*) Each stockyard owner, in addition to other necessary records, shall make and keep an accurate record of the number of head of each class of livestock received, shipped, or disposed of locally each day. Each market agency or dealer buying or selling livestock on a commission basis or otherwise, except packer buyers registered as dealers, to purchase livestock for slaughter only, in addition to other necessary records, shall make and keep an accurate record of the number and weight of livestock bought, sold, or otherwise disposed of each business day, the prices paid or received therefor, and the charges made for services.

(*b*) Each licensee buying or selling live poultry on a commission basis or otherwise, in addition to other necessary records, shall make and keep an accurate record of the number of pounds of live poultry bought or sold each business day, the prices paid or received therefor, and the charges made for services and facilities.

§ 201.49 *Requirements regarding scale tickets evidencing weighing of livestock or live poultry.* When livestock or live poultry is weighed for purposes of purchase or sale, a scale ticket shall be issued which shall show the name of the agency performing the weighing service, the date of the weighing, the number of the scale or other information identifying the scale upon which the weighing is performed, the name of the seller, the name of the buyer, and the name of the consignor, or understandable abbreviations of such names. In the case of livestock, in addition to the information referred to in this section, the scale ticket shall show the number of head, kind, and actual weight of the livestock, the amount of dockage, if any, and the name or initials of the person who weighed the livestock. In the case of live

poultry, in addition to the information referred to in this section, the scale ticket shall show the number of coops weighed, the gross, tare, and net weights, and the name or initials or the person operating the scale at the time the weighing is done. At stockyards only stockyard owners, or State agencies registered as market agencies (when weighing is required to be performed by State agencies) shall weigh livestock and execute and issue scale tickets. In transactions subject to the act at other locations, market agencies, dealers and packers shall be responsible for the accurate weighing of livestock and the execution and issuance of scale tickets.

In live poultry marketing areas designated under the act only licensees shall weigh live poultry and execute and issue scale tickets. Scale tickets issued under this section shall be in triplicate form, serially numbered, and if such tickets are used on a type-registering beam they shall conform to the specifications of the National Bureau of Standards. One copy shall be retained by the stockyard owner, market agency, dealer, licensee or other person issuing the same, and one copy shall be furnished to the seller and one copy to the buyer. Duly authenticated copies shall be furnished on request to any owner or consignor of livestock or live poultry. No change in weight shall be made except upon a reweighing of the livestock or live poultry. In the case of an error of the weighmaster in preparing the scale ticket, other than in the weight, he shall prepare a corrected scale ticket showing the corrections made and stating on the back thereof the reasons for such changes. In the event of an error in the preparation of a scale ticket, other than in the weight, due to misinformation having been furnished by the seller or buyer, the weighmaster upon request of the seller or buyer shall issue another ticket bearing appropriate corrections or a correction slip which shall show thereon the changes made and on the back thereof the reasons for such changes. Before such correction ticket or slip shall be issued the weightmaster shall require the person request-

ing the change to sign such ticket or slip. The correction ticket or slip shall be attached to the original ticket, bear the same serial number, and show on its face that that it is a correction ticket or slip.

§ 201.55 *Purchases and sales to be made on actual weights.* When livestock or live poultry is bought or sold on a weight basis in transactions subject to the provisions of the act, settlement therefor shall be on the basis of the weight shown on the scale ticket or correction ticket, as the case may be. Any weight figures shown on accounts of sale, accounts of purchase, invoices, bills, or statements issued in connection with transactions subject to the act shall be actual weights obtained on scales operated or used by stockyard owners, market agencies, dealers, or packers, in the case of livestock, or on scales operated by licensees, in the case of live poultry, at the place and at the time of the consummation of the transactions in question or, if not, shall be appropriately explained on the accounting, bills, or statements issued.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Petition

To: The Honorable Orville L. Freeman
Secretary of Agriculture
United Stated Department
of Agriculture
Washington, D. C.

Comes now Arnold Fairbank, d/b/a Arnold Fairbank Cattle, Company, duly engaged in the business of buying and selling livestock and respectfully states that:

1. Petitioner has his principal office and place of business at Planters Hotel Building, P. O. Box 1223, Brawley, California, and is registered with the Secretary of Agriculture

under the provisions of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.)

2. Petitioner is engaged in the highly competitive business of buying and selling cattle principally in country transactions in many states in the South and Western portion of the United States, and approximately 8,500 other firms are also engaged in the business of buying and selling livestock in commerce, and are so registered under the Act.

3. Public Law 85-909 (H.R. 9020) enacted on September 2, 1958, amended the Packers and Stockyards Act (7 U.S.C. 181 et seq.) and placed all livestock transactions in interstate commerce under the exclusive administration jurisdiction of the United States Department of Agriculture. Prior to September 2, 1958, only market agencies and dealers operating at posted stockyards or approximately 2,400 firms were subject to the provisions of the Act.

4. The Secretary of Agriculture in promulgating regulations under the Packers and Stockyards Act, namely, Sections 201.46, 201.49, and 201.55 did not consider the business practices engaged in by petitioner and other livestock operators in buying and selling livestock in country transactions but considered only practices engaged in on posted stockyards. Country livestock transactions due to lack of available weighing facilities, transportation long distances, feeding, and handling of the livestock, differ substantially from transactions at posted stockyards. The practices of adjusting weights for shrink, averaging weights, estimating weights, prorating weights, use of pencil shrink and other procedures, are well known and recognized by those buying and selling livestock in country transactions in the United States.

5. The jurisdiction of the Secretary of Agriculture was extended in 1958 by the enactment of Public Law 85-909 to country livestock transactions, however, no public hearings have been held by the Secretary in the years which have elapsed since September 2, 1958, for the purpose of receiv-

ing evidence from the livestock industry as to the methods used and recognized by livestock operators in the purchase and sale of livestock in country transactions.

6. The Packers and Stockyards Division, of the United States Department of Agriculture, with full knowledge that country livestock transactions differ substantially from transactions at posted stockyards, nevertheless is now attempting by formal action to apply the provisions of Regulations 201.46, 201.49, and 201.55 under the Packers and Stockyards Act to petitioners country transactions, knowing that said regulations were never intended to be applicable to country transactions, and therefore, said formal action is improper, unwarranted, and will cause irreparable injury to your petitioner and will deprive petitioner of its property without due process of law and will precipitate widespread disruption of presently stabilized livestock marketing procedures and will create confusion rather than promote the orderly marketing of livestock.

7. The orderly marketing of livestock in country transactions throughout the United States is of vast economic importance to the Nation, and public interest requires the Secretary of Agriculture to duly consider the provisions of 201.46, 201.49, and 201.55 of the regulations under the Packers and Stockyards Act and the application of said regulations to country livestock transactions, by the holding of public hearings throughout the United States, for the purpose of amending, repealing, or revising said regulations, or in the alternative the promulgation of new regulations applicable solely to country livestock transactions.

Therefore, I, Arnold Fairbank, respectfully petition the Secretary of Agriculture under the provisions of the Administrative Procedure Act, 60 Stat. 237, 5 USCA paragraph 1001 et seq., to forthwith, amend, repeal, or revise Sections 201.46, 201.49, and 201.55. (9 CFR 20.146, 201.49, and 201.55) of the regulations promulgated by the Secretary under the provisions of the Packers and Stockyards,

or in alternative promulgated new regulations for country livestock transactions relating to record requirements, the weighing of livestock for the purpose of purchase or sale, and the weight to be shown on scale tickets, accounts of purchase, invoices, bills or statements issued by registrants in country transactions, and further that the Secretary take such further action as may be required in the premises to the end that regulations based upon stockyard transactions are not imposed upon petitioner in country transactions.

Arnold Fairbank
ARNOLD FAIRBANK, d/b/a
Fairbank Cattle Company,
Petitioner

Counsel for Petitioner:

DONALD L. BOWMAN
Attorney at Law
Suite 202, 135 Center Street, S.
Vienna, Virginia

UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE
Washington, D. C. 20250

Jun 14 1966

Mr. Arnold Fairbank
Planters Hotel
P. O. Box 1223
Brawley, California 92227

Dear Mr. Fairbank:

This is in reply to the Petition received June 8, 1966, relating to certain regulations issued under the Packers and Stockyards Act.

In your Petition you requested that sections 201.46, 201.49, and 201.55 of the regulations promulgated by the Secretary under the provisions of the Packers and Stockyards Act

be repealed on the basis that such regulations are not valid and are not responsive to the present conditions in the livestock industry. It is your position that since these sections of the regulations were promulgated prior to the amendments to the Packers and Stockyards Act in 1958, the business practices of livestock operators buying and selling in country transactions were not taken into consideration in connection with the issuance of such regulations, and they are therefore not responsive to the needs of the industry.

The 1958 amendments to the Packers and Stockyards Act extended the application of Title III of the law, previously limited to public stockyards, to country transactions in commerce. In 1959, notice was published in the Federal Register that the Department, pursuant to the informal rulemaking provisions of the Administrative Procedure Act, was considering amendments to certain regulations under the Act, including the regulations in question (24 FR 1473-1474). After all parties were afforded full opportunity to submit views, the regulations in question were amended to make them applicable to all livestock transactions in commerce (24 FR 3182-3184).

It is the policy of the Packers and Stockyards Division to continually review the regulations promulgated under the Packers and Stockyards Act to be certain that they are responsive to the continuing changes in the livestock industry. In our opinion, sections 201.46, 201.49, and 201.55 meet that test. Therefore, we do not believe that further rulemaking proceedings with reference to the regulations in question should be instituted at this time.

Sincerely yours,

CLARENCE H. GIRARD

cc:

Donald L. Bowman, Attorney at Law, Vienna, Va.
J. W. Brinckmeyer, Huntington Park, California
Raymond W. Fullerton, OGC

Received October 28, 1966

UNITED STATES DEPARTMENT OF AGRICULTURE

Before the Secretary of Agriculture

P. and S. Docket No. 3683

In re: ARNOLD FAIRBANK, d/b/a
ARNOLD FAIRBANK CATTLE COMPANY
Respondent

Motion To Inspect and Copy

Comes now Arnold Fairbank, d/b/a Arnold Fairbank Cattle Company, by counsel, and respectfully moves the Hearing Examiner to order the Packers and Stockyards Division, of the United States Department of Agriculture to permit defense counsel to inspect and copy, prior to the hearing, the following tangible objects, which are in the possession of the Packers and Stockyards Division:

1. Any and all statements or admissions made by the respondent to government agents, at any time or place, which have been reduced to writing.

2. Any and all statements, or admissions, by the respondent to government agents, at any time or place, whether reduced to writing or not.

3. Any and all statements or admissions made by other persons subject to the Packers and Stockyards Act, and persons not subject to the Act, relating to the operations of the respondent, at any time or place, which have been reduced to writing.

4. Any and all statements or admissions made by persons other than the respondent, subject to the Act, and persons not subject to the Act, relating to the operations of the

respondent, at any time or place, whether reduced to writing or not.

5. All books, documents, livestock records, and tangible objects obtained from, or belonging to the respondent, or obtained from others, which relate to the operations of the respondent.

6. All audits, audit reports, summaries or other explanations of the reports, by agents of the government, at any time or place, relating to respondents' livestock operations.

7. All investigative reports, summaries or other explanations of the reports, made by agents of the government, at any time or place, relating to respondents' livestock operations.

8. All notes, memoranda or other documents made by agents of the government, at any time or place, relating to respondents' livestock operations.

9. List of persons interviewed by agents of the government, at any time or place, relating to respondents' livestock operations.

10. All letters, correspondence, telegrams, or memoranda, in the files of the Packers and Stockyards Division, relating to the livestock operations of the respondent.

11. All other books, papers, documents or other objects obtained by government agents in any manner, if such books, papers, documents or objects may be offered in evidence at the hearing.

As the basis for this motion, respondent states that the objects requested are material and necessary to the preparation of his defense, and,

The above objects are needed in order for respondent's counsel to properly advise the respondent, and to prepare for the hearing.

This Motion is made in good faith, and not for the purpose of delay. The requested items are in the possession of the Packers and Stockyards Division and cannot be examined prior to the hearing other than by order of the Hearing Examiner.

Respectfully Submitted,

ARNOLD FAIRBANK

Arnold Fairbank d/b/a
Arnold Fairbank Cattle Co.

DONALD L. BOWMAN

Donald L. Bowman
Attorney at Law
Suite 202, 135 Center Street, S.
Vienna, Virginia
Counsel for Respondent

Received June 24, 1966

UNITED STATES DEPARTMENT OF AGRICULTURE

Before the Secretary of Agriculture

P. and S. Docket No. 3683

In re: ARNOLD FAIRBANK, d/b/a
ARNOLD FAIRBANK CATTLE COMPANY
Respondent

Motion for Declaratory Order

Comes now the respondent, Arnold Fairbank, d/b/a Arnold Fairbank Cattle Company, by counsel, and respectfully moves the Secretary of Agriculture to issue a

Declaratory Order under the provisions of Section 5(d) of the Administrative Procedures Act 60 Stat 237, 5 USCA 1004 as to the validity of Sections 201.46, 201.49, and 201.55 of the Regulations under the Packers and Stockyards Act, (9 CFR 201.46, 201.49, and 201.55) as applied to country livestock transactions, i.e., transactions not at posted stockyards.

In support of this Motion, respondent files herewith a copy of a Petition filed by the respondent with the Secretary of Agriculture to amend, repeal, or revise, Sections 201.46, 201.49, and 201.55 of the Regulations under the Packers and Stockyards Act or in the alternative to promulgate new regulations applicable to country transactions. A copy of said petition is attached hereto, incorporated herein, and marked as Exhibit A.

Wherefore, respondent prays,

1. That respondent be granted an opportunity to present oral argument in support of this Motion prior to the date respondent is required to answer the complaint filed herein.

2. That this Motion be certified by the Hearing Examiner to the Judicial Officer.

3. That an order be entered by the Judicial Officer declaring Sections 201.46, 201.49, and 201.55 of the Regulations under the Packers and Stockyards Act illegal, and void as to country livestock transactions.

4. That respondent's time to submit an answer in this proceeding be extended thirty (30) days after notice of the decision on the above motion.

ARNOLD FAIRBANK, d/b/a
ARNOLD FAIRBANK CATTLE COMPANY

By DONALD L. BOWMAN

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

P & S Docket No. 3683

In re

ARNOLD FAIRBANK, d/b/a ARNOLD FAIRBANK CATTLE COMPANY, *Respondent*

Decision and Order

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*), instituted by a complaint filed April 29, 1966, by the Director, Packers and Stockyards Division (presently the Packers and Stockyards Administration), Consumer and Marketing Service, United States Department of Agriculture. Respondent is a dealer within the meaning of the act and registered with the Secretary to buy and sell livestock in commerce for his own account.

The complaint alleges, in part, that in numerous transactions during the approximate period January 4 through August 25, 1965, respondent purchased livestock in Texas and "knowingly sold such livestock for his own account on a weight basis, in commerce . . . at false and incorrect weights which respondent obtained by adding an arbitrary number of pounds to the purchase weights," and that respondent "knowingly issued sales invoices to the purchasers of the livestock showing such false and incorrect weights and receive payments from said purchasers based upon said false and incorrect weights . . .," in willful violation of the act and the regulations issued thereunder. A copy of the complaint and a copy of the rules of practice were served upon respondent May 6, 1966.

After several extensions of time to file an answer to the complaint were granted and respondent had filed nu-

merous motions which were denied, including a motion to strike parts of the complaint, a motion for informal settlement, a motion for a more definite statement and a motion for a declaratory order as to the validity of certain regulations, respondent filed an answer September 8, 1966. In his answer, respondent, in effect, denied the material allegations of the complaint. Subsequent to the filing of an answer, respondent filed additional motions which were denied including a motion to stay the hearing herein.

An oral hearing was held before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, at El Centro, California, November 29 - December 2, 1966, and June 28 and 29, 1967. At the hearing, respondent was represented by Donald L. Bowman, Attorney at Law, Vienna, Virginia, and complainant was respresented by Raymond W. Fullerton, Office of the General Counsel, United States Department of Agriculture. Complainant introduced 67 exhibits or series of exhibits into evidence and 29 witnesses testified on complainant's behalf. Respondent introduced 11 exhibits or series of exhibits into evidence and 3 witnesses testified on respondent's behalf. After the hearing, the parties filed extensive briefs. On May 17, 1968,, the hearing examiner filed a report containing proposed findings of fact and conclusions and recommending that respondent be found to have violated the act as charged, be ordered to cease and desist from such violations and to keep adequate records, and be suspended as a registrant under the act for a period of 2 years. The parties filed exceptions to the hearing examiner's report, respondent also filed objections to the actions of the hearing examiner, and oral argument was held before the Judicial Officer in Washington, D. C., September 18, 1968.

Findings of Fact

1. Respondent, Arnold Fairbank, is an individual doing business as Arnold Fairbank Cattle Company, whose ad-

dress is Planters Hotel, P. O. Box 1223, Brawley, California.

2. At all times material herein, it was a well-established custom and practice in the livestock trade in Arizona and California for buyers of feeder cattle from sellers who had purchased the cattle at other points, including in the State of Texas, to buy said cattle on the basis of the weights at which the seller purchased them at such other points.

3. Cattle shipped from Texas and the southeastern part of the United States to Arizona and California normally experience a weight loss or "shrink" from point of shipment to destination. Such weight loss normally occurs even if the cattle so shipped are stopped en route for feed, water and rest at a rest stop. This loss in weight is caused by excretory and tissue shrink.

4. On or about the dates and in the transactions set forth below, respondent purchased feeder cattle from Ed. Wareham, Jr., or Cattleman's Livestock Commission Company, dealers located in Texas, at the weights shown in column (4) of the tabulation below. Purchase invoices were transmitted to respondent by the dealers in connection with the transactions, and such invoices were maintained as a part of respondent's books and records, except as hereinafter noted. The invoices showed, in part, the description, purchase weight, and purchase price of the cattle purchased by respondent. Respondent did not have purchase invoices in his books and records in connection with the first ten transactions listed below. However, he had paid drafts with respect thereto which showed the number of head, purchase weight, and purchase price of the cattle purchased. Respondent paid for the cattle on the basis of the weights shown on the purchase invoices or the paid drafts. On the dates of said purchases, as shown in column (1) of the tabulation below, or within a few days thereafter, respondent knowingly sold cattle for his own account on a weight basis, in commerce, to various customers in

California, at false and incorrect weights which respondent obtained by adding an arbitrary number of pounds to the weights at which he had purchased the cattle, as shown in column (6) below. Such cattle were transported by various truckers from the places at which respondent received the cattle and delivered to the customers of respondent, or their agents or principals, in California or Arizona.

(1) Date 1965	(2) No. of Head	(3) Sold to	(4) Purchase Weight (pounds)	(5) Sales Invoice Weight (pounds)	(6) Weight Added (pounds)
January 14	86	Imperial Cattle Co. Imperial, California	46,815	48,135	1,320
January 16	78	Imperial Cattle Co. Imperial, California	40,795	42,295	1,500
January 18	92	Heber Cattle Feeders Heber, California	42,865	44,345	1,480
January 22	76	Imperial Cattle Co. Imperial, California	41,390	42,585	1,195
January 24	73	Rocking Arrow Cattle Co. Calipatria, California	40,835	42,510	1,675
January 25	93	Heber Cattle Feeders Heber, California	40,785	42,285	1,500
January 25	92	Imperial Cattle Co. Imperial, California	40,795	42,040	1,245
February 1	78	Rocking Arrow Cattle Co. Calipatria, California	44,075	45,120	1,045
February 4	89	Imperial Cattle Co. Imperial, California	41,720	42,480	760
February 7	82	Imperial Cattle Co. Imperial, California	42,855	43,620	765
February 25	93	Stafford Hannon Brawley, California	43,055	43,930	875
February 28	70	Rocking Arrow Cattle Co. Calipatria, California	42,770	44,990	2,220
March 4	93	Danny Danenberg El Centro, Caliifornia	40,190	41,490	1,300

(1) Date 1965	(2) No. of Head	(3) Sold to	(4) Purchase Weight (pounds)	(5) Sales Invoice Weight (pounds)	(6) Weight Added (pounds)
March 23	92	Jack Hannon Brawley, California	41,150	42,720	1,570
March 26	111	Berylwood Investment Co. Somis, California	43,795	45,195	1,400
April 2	265	Imperial Cattle Co. Imperial, California	163,390	169,985	6,595
April 3	105	Berylwood Investment Co. Somis, California	42,590	43,890	1,300
April 10	69	Rocking Arrow Cattle Co. Calipatria, California	42,451	43,840	1,389
April 11	75	Imperial Cattle Co. Imperial, California	42,279	43,680	1,401
April 13	109	Berylwood Investment Co. Somis, California	41,910	43,310	1,400
April 15	69	Rocking Arrow Cattle Co. Calipatria, California	42,335	43,720	1,385
April 15	99	Imperial Cattle Co. Imperial, California	40,655	41,900	1,245
April 23	102	Berylwood Investment Co. Somis, California	41,527	42,925	1,398
April 23	72	Rocking Arrow Cattle Co. Calipatria, California	42,050	43,290	1,240
April 30	100	L & L Cattle Co. & Berylwood Investment Co Somis, California	41,518	43,020	1,502
May 1	79	Berylwood Investment Co. Somis, California	41,579	43,080	1,501
May 8	73	Rocking Arrow Cattle Co. Calipatria, California	42,120	42,850	730
May 8	72	Imperial Cattle Co. Imperial, California	40,703	40,780	77
May 10	96	Berylwood Investment Co. Somis, California	41,128	42,560	1,432

(1) Date 1965	(2) No. of Head	(3) Sold to	(4) Purchase Weight (pounds)	(5) Sales Invoice Weight (pounds)	(6) Weight Added (pounds)
May 10	72	Rocking Arrow Cattle Co. Calipatria, California	42,897	44,390	1,493
May 15	100	Berylwood Investment Co. Somis, California	40,984	42,310	1,326
May 17	73	Rocking Arrow Cattle Co. Calipatria, California	41,622	42,760	1,138
May 18	103	Berylwood Investment Co. Somis, California	42,635	43,490	855
May 24	74	Imperial Catfle Co. Imperial, California	42,189	44,390	2,201
May 24	101	Danny Danenberg El Centro, California	41,686	43,120	1,434
May 31	70	Imperial Cattle Co Imperial, California	40,539	42,680	2,141
June 5	77	Imperial Cattle Co. Imperial, California	43,104	43,840	736
June 6	75	Rocking Arrow Cattle Co. Calipatria, California	41,887	42,920	1,033
June 6	80	Walter Skoog Imperial, California	42,765	44,265	1,500
June 8	103	Danny Danenberg El Centro, Caliifornia	42,997	44,480	1,483
June 9	68	Rocking Arrow Cattle Co. Calipatria, California	40,987	41,380	393
June 12	75	Rocking Arrow Cattle Co. Calipatria, California	42,690	43,220	530
June 12	69	Imperial Cattle Co. Imperial, California	41,197	41,440	243
June 15	69	Rocking Arrow Cattle Co. Calipatria, California	42,575	42,980	405
July 3	73	Rocking Arrow Cattle Co. Calipatria, California	41,660	43,040	1,380
July 13	72	Rocking Arrow Cattle Co. Calipatria, California	41,390	41,780	390

(1) Date 1965		(2) No. of Head	(3) Sold to	(4) Purchase Weight (pounds)	(5) Sales Invoice Weight (pounds)	(6) Weight Added (pounds)
July	16	73	Rocking Arrow Cattle Co. Calipatria, California	41,179	41,460	281
July	17	74	Imperial Cattle Co. Imperial, California	41,836	43,470	1,634
July	18	100	Berylwood Investment Co. Somis, California	40,130	41,530	1,400
July	18	70	Rocking Arrow Cattle Co. Calipatria, California	42,222	43,770	1,548
July	19	78	Rocking Arrow Cattle Co. Calipatria, California	41,112	43,160	2,048
July	26	71	Rocking Arrow Cattle Co. Calipatria, California	41,148	43,310	2,162
July	26	102	Berylwood Investment Co. Somis, California	40,290	41,790	1,500
August	6	73	Imperial Cattle Co. Imperial, California	41,023	41,870	847
August	13	74	Rocking Arrow Cattle Co. Calipatria, California	41,957	42,480	523
August	17	69	Rocking Arrow Cattle Co. Calipatria, California	40,441	40,600	159
August	14	70	Rocking Arrow Cattle Co. Calipatria, California	41,906	43,820	1,914
August	20	69	Rocking Arrow Cattle Co. Calipatria, California	40,427	41,300	873
August	23	71	Rocking Arrow Cattle Co. Calipatria, California	41,784	43,300	1,516

5. In connection with the transactions referred to in Finding of Fact 4, respondent knowingly issued sales invoices to the purchasers of the cattle showing the false and incorrect weights set forth in column (5) of the tabulation in said Finding of Fact. In some instances the sales invoices were issued and transmitted to the purchasers by United State mail. There was no explanation on the

invoices to indicate how the weights shown on the invoices were obtained, and the purchasers of the cattle had no knowledge that respondent had obtained such weights by adding an arbitrary number of pounds (as shown in column (6) of the tabulation in said Finding of Fact 4) to the weights at which he had purchased the cattle. Copies of such sales invoices were made a part of the accounts and records of respondent, and copies issued to Caltah Cattle Company, which at all times material herein was a dealer within the meaning of the act, were made a part of the accounts and records of this company.

6. In connection with the transactions set forth in Finding of Fact 4, respondent knowingly received payments from the purchasers of the cattle based upon the false and incorrect weights shown on the invoices, referred to in Finding of Fact 5 herein. The sales prices included all costs and expenses of respondent to point of delivery and a margin of profit. Any adjustments in price or weight prior or subsequent to payment for the cattle, for any reason, were made on the basis of the false weights and the prices shown on the sales invoices. All losses of cattle due to sickness, injury or death in transit were the responsibility of the trucking company hauling the cattle, and were deducted by respondent from the freight charges of the haulers.

7. When the livestock involved in the transactions set forth in Finding of Fact 4 arrived at their destination in California after shipment, they weighed substantially less than the weights at which respondent billed his customers, and less than respondent's purchase weights.

8. Respondent would have had to sell the livestock involved in the transactions referred to in Finding of Fact 4 at a significantly higher price per hundredweight in order to obtain the total purchase price resulting from the addition of an arbitrary number of pounds to his purchase weights.

9. Respondent, in connection with his dealer operations under the act, failed to keep buyers' invoices of the first ten livestock transactions set forth in Finding of Fact 4 and accurate records of the weights of livestock bought, sold, or otherwise disposed of each business day during the approximate period January 4 through August 25, 1965.

CONCLUSIONS

The complaint filed herein alleges, in part, that respondent "during the period from on or about January 4, 1965, through on or about August 25, 1965, purchased livestock for his own account in Texas" at listed or stated weights "and, on the dates of said purchases or within a few days thereaffer, knowingly sold such livestock for his own account on a weight basis, in commerce, to various persons, at false and incorrect weights which respondent obtained by adding an arbitrary number of pounds to the purchase weights." Specific instances of such practice are then set forth in the complaint. This allegation of the complaint represents the most serious charge made therein.

"This major allegation of the complaint has evoked much heat and controversy in this proceeding and a great deal of evidence has been adduced in connection therewith. When the 'smoke' clears, however, it is patent and . . . 'inescapable' that the charge has been established." *In re L. L. Schaffner, et al.*, 21 A.D. 8, 15 (1962). In fact, no other conclusion is possible on the basis of this record.

It is clear from the record that the weight at which respondent sold the livestock involved herein and which was listed on his invoices to the purchasers thereof resulted from the addition of an *arbitrary* number of pounds to the weight at which respondent purchased such livestock. (See Finding of Fact 4). That there was a difference between the weight at which respondent purchased and resold livestock in the transactions involved and that such a difference represented a substantial increase over the weights at

which respondent had purchased such livestock is demonstrated by extensive tabulations prepared by complainant's employees based on respondent's records.

The increase in weight so found over respondent's purchase weights is not capable of any other explanation. The added weight could not have resulted from a gain in weight in transit since stocker and feeder livestock shipped long distances will experience a substantial "shrink" or weight loss rather than a weight gain. See *In-Transit Shrinkages of Cattle*, Mimeograph Circular No. 78, pp. 5-6 and 27; *Shrink During Shipment of Feeder Cattle*, A. S. Leaflet R88. The "off-truck" and "catch" weights of the livestock taken by the purchaser thereof or the truckers corroborate this conclusion. Such weights were uniformly lower than respondent's purchase or sale weights. While respondent adduced some testimony to the effect that feeder livestock will gain some weight at a feed and rest stop, such testimony is of no assistance to respondent. Of course, livestock will gain weight at a rest stop over the weight of the livestock upon arrival at such stop. But, the record amply demonstrates that livestock will not arrive at a distant destination showing a gain over original shipping weight.[1] Such a result is incredible and, upon analysis, is not really contended by respondent.

Nor can the added weight involved herein be attributed to the sorting of the animals, that is, changing the composition of a shipment, at a feed and rest stop. While respondent introduced very general and nonspecific testimony that this was or could be done, he has far from

[1] While some truck drivers appear to state that such was the case, they were comparing, in reality, the weight at destination with some approximate weight supplied to them at point of origin in connection with load limits on the truck. The drivers testified that the weight at destination did not exceed the weight at shipping point in those instances when the drivers themselves had the livestock weighed on public truck scales at shipping point.

established that the animals in a *particular* shipment involved which was received in California and Arizona were different in part from those shipped from Texas in such load. In fact, the rest stop operators testified, in effect, that the livestock which were hauled for respondent from Texas to California and Arizona were not sorted, shaped or reweighed at the rest stops between such points. Also, some of the truck drivers who hauled many of the loads of livestock involved corroborated such testimony. Furthere, even assuming that some sorting of livestock occurred at the rest stops, there does not appear to be weighing facilities at such stops or any means to determine the weight of the load as reconstituted. It is extremely significant, it seems to us, that respondent, who was the individual who would know how the weights listed on his invoices to his purchasers were arrived at failed to testify in this connection at the hearings. Cf. *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-227 (1939); *Bilokumsky* v. *Tod*, 263 U.S. 149, 154 (1923); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F.2d, 555, 560 (7th Cir. 1939); *In re Harry Lee Sparks and Rex Wanda Sparks*, 19 A.D. 709, 725 (1960), *affirmed* D.C. Cir. May 2, 1961. See also 2 Wigmore, Evidence § 289 (3d ed. 1940). In addition, respondent's records did not indicate how the pertinent invoice weights were arrived at. Moreover, the hearing examiner who was in a position to observe the demeanor of respondent's witnesses appears to have placed little or no credence in their testimony with respect to sorting of the livestock involved while they were en route to California and Arizona. See, *e.g.*, *Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 479 (7th Cir. 1953); *Ohio Tel. Co.* v. *National Labor Relations Board*, 192 F.2d 664, 668 (6th Cir. 1951); *In re Davenport Packing Company, Inc.*, 20 A.D. 188, 192 (1961).

Of course, respondent sold the lovestock involved as a dealer and not in a fiduciary capacity as a market agency or agent of the purchaser and need not have sold such live-

stock on the basis of the weights at which he had purchased such feeder livestock. But, the record demonstrates that, in reality, respondent purported to, and *contracted* to, sell the feeder livestock involved herein on the basis of respondent's purchase weights. It is evident that during the period involved and for some time prior thereto it was the custom and practice in the livestock industry in California and Arizona for purchasers of feeder cattle from vendors who had purchased the cattle from other areas, including the State of Texas, to buy such feeder livestock on the basis of the weights at which the vendors had purchased the livestock, that is, as applied to the sales involved here, on the basis of the weights at which respondent had purchased the livestock in Texas. Many of the vendees of the livestock involved testified that they understood or assumed that the weights quoted to them during the sales negotiations and listed on the sales invoices received from respondent in connection with the pertinent sales were the weights at which respondent purchased the livestock at point of origin. With delivery of the livestock directly to the buyers' facilities absent further weighing thereof by respondent, it is clear why the buyers of livestock from respondent so understood the invoice weight. The record does not support any other weight basis in the sales involved and, in fact, many of the buyers indicated, in effect, that they would not have purchased the livestock if they had known that the invoiced weight was not respondent's purchase weight at point of origin, that is, if they had known that arbitrary amounts had been added to the weights at which respondent had purchased the livestock. Here too, it is significant that respondent did not testify with respect to the weight basis of the contracts he made with the purchasers of the stocker and feeder cattle involved.

In view of all the foregoing, it is concluded that respondent willfully violated section 312(a) of the act (7 U.S.C. 213(a)) by knowingly engaging in the unfair and deceptive practice of selling livestock in commerce "at false and

incorrect weights which respondent obtained by adding an arbitrary number of pounds to the purchase weights", as charged in the complaint. (See Finding of Fact 4).[2] Cf. *e.g., In re Harry Lee Sparks and Rex Wanda Sparks, supra; In re Joseph L. Mitchell, d/b/a LaSalle County Livestock Marketing Center*, 21 A.D. 124 (1962), *affirmed* 308 F.2d 855 (7th Cir. 1962), *cert. denied* 372 U.S. 935 (1963); *In re Jay Mellinger*, 21 A.D. 354 (1962); *In re Milton Silver, d/b/a Chambersburg Livestock Sales*, 21 A. D. 1438 (1962). It is patent that, and the record requires a finding that, such practice was unfair and deceptive to the purchasers of the livestock involved and unfair to the competitors of respondent in the sale of stocker and feeder livestock in interstate commerce.[3]

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[2] We have not included in Finding of Fact 4 a sale by respondent of 82 head of livestock to John Stone, buyer for Sur Vall Packing Company, as it seems clear from Stone's testimony that he was not buying such livestock on the basis of respondent's purchase weight.

[3] A very similar or companion proceeding, in which respondent's attorney also represented the respondent therein, was recently decided. See In re Boone Livestock Company, Inc., 27 A.D. 475 and 639 (1968). Respondent's contentions with respect to the fact that he made no affirmative statements or representations during negotiations with his customers or on the invoices issued in connection therewith that the stated or listed weight in each transaction was his purchase weight, that his customers took "off truck" weights of the cattle purchased from respondent, that the sales in issue were allegedly sales on approval, that respondent made adjustments in the purchase price to the purchasers in some of the transactions involved, that respondent's purchase weights for the livestock in Texas did not necessarily represent the actual weight of the livestock on the date of purchase, that there are recognized and permitted methods of adjustment from actual weight and that his violations were not willful were raised and dealt with in detail in the *Boone* case and no useful purpose would be served by iterating such discussion herein. It need only be stated that such contentions are without merit or materiality for the reasons stated in the *Boone* case.

It is further apparent that other allegations of the complaint ancillary to the major charge contained therein and discussed above have been established. In other words, it is clear that respondent, as alleged in the complaint, in connection with the transactions in which he knowingly sold livestock at false and incorrect weights, "knowingly issued sales invoices to the purchasers of the livestock showing such false and incorrect weights and received payments from said purchasers based upon said false and incorrect weights. Copies of such sales invoices were made a part of the accounts and records of respondent . . ." Of course, the issuance of invoices showing false and incorrect weights and the receipt of payment based on false and incorrect weights constitute unfair and deceptive practices in willful violation of section 312(a) of the act. See, *e.g.*, *In re Joseph L. Mitchell, d/b/a La Salle County Livestock Marketing Center, supra; In re Harry Lee Sparks and Rex Wanda Sparks, supra.*[4] While in some instances respondent made adjustments in price or weight to his customers, such adjustments were based on and *measured from* the false and incorrect weights contained in respondent's invoices. Also, by making copies of the false and incorrect

[4] The issuance of invoices showing false and incorrect weights which were not actual weights, without further explanation, also violates section 201.55 of the regulations issued pursuant to the act (9 CFR 201.55). Respondent has strenuously challenged throughout this proceeding the validity of section 201.55 of the regulations in addition to sections 201.46 and 201.49 thereof on the ground basically that they apply to transactions at stockyards and do not or cannot apply to "country transactions". While such was the case prior to September 2, 1958, the date of the extension of coverage of the act (see 72 Stat. 1749), the regulations including the challenged sections thereof were specifically amended after extensive rulemaking procedure to cover "country transactions" (see 24 F.R. 3182). Respondent's contentions in this regard are totally without merit. Further, violations of these sections of the regulations, as distinguished from the violaions of the act found herein, are of little consequence as it is the violation of the act which solely results in sanctions.

invoices a part of his accounts and records respondent willfully violated section 401 of the act (7 U.S.C. 221). *See, e.g., In re Paul Coyne*, 19 A.D. 1261 (1960); *In re Clyde W. Long*, 19 A.D. 1273 (1960).

The record established that respondent's false and incorrect invoices were made a part of the accounts and records of Caltah Cattle Company, a subsidiary of Berylwood Investment Co. and a dealer as defined in the act. We see no violation of sections 312(a) or 401 of the act by reason thereof. While such action probably violates section 402 of the act which makes applicable Section 10 of the Federal Trade Commission Act (15 U.S.C. 50) (see, *e.g., In re Joseph L. Mitchell, d/b/a La Salle County Livestock Marketing Center, supra; In re Paul Coyne, supra; In re Clyde W. Long, supra*), such violation was not charged in the complaint and we make no such finding. However, the record establishes that respondent willfully failed to keep buyers' invoices for all livestock purchases (cf. *In re Swift & Company*, 23 A.D. 429, 446-448) and willfully failed to keep an accurate record of the weight of livestock bought, sold, or otherwise disposed of each business day, in violation of section 401 of the act and section 201.46 of the regulations (9 CFR 201.46). *In re Boone Livestock Company, Inc.*, 27 A.D. 475 (1968).[5]

Respondent, with his exceptions, filed lengthy objections to the actions of the hearing examiner. These objections are based in large part upon the failure of the examiner to find or rule in respondent's behalf in connection with motions filed prior to the hearing and with respect to the admissibility of evidence at the hearing. Respondent's contentions in this connection were similarly raised and dealt with in detail in *In re Boone Livestock Company, Inc., supra*, and no useful purpose would be served by

[5] Complainant has apparently abandoned the charge that respondent violated section 201.49 of the regulations issued pursuant to the act (9 CFR 201.49) and we make no such finding.

repeating such discussion herein. It need only be stated that such contentions are without merit for the reasons stated in the *Boone* case.

For the first time in this proceeding, counsel for respondent stated at the oral argument that apparently immediately after the reopened hearing herein in the latter part of June 1967, some unnamed rebuttal witness presented by complainant admitted to him that he and some of the other witnesses had lied at such reopened hearing in connection with waybills or, we assume, trip logs required by the Interstate Commerce Commission to be kept; that such witnesses allegedly had not driven some of the livestock involved although the waybill or waybills so indicated; and that counsel for respondent so informed counsel for complainant upon the return of respondent's counsel to the Washington, D. C. area. Counsel for complainant stated at the oral argument that counsel for respondent had told him that some of these truck-driver witnesses had stated to him that they were not present on the entire trip of a load or loads of livestock contrary to the information contained on pertinent waybills but that respondent did not want any further investigation of the matter.

As indicated above, the record is devoid of any prior reference to alleged prejured testimony. Counsel for respondent delayed approximately 15 months before making this a matter of record. In addition, even assuming that one or more of the truck-driver witnesses were not present for part of or the entire trip of a load or loads of respondent's livestock, our conclusions herein would be unaffected. The rebuttal truck-driver witnesses, in response to the very general testimony of respondent's witnesses, in part, testified *generally* as to whether they ever sorted, were requested to sort, or weighed respondent's livstock at rest stops while such livestock were en route to California and Arizona. It is apparent, as indicated by California public weighing station scale tickets, that such drivers did drive

some of the loads involved in addition to other loads for respondent and their testimony with respect to a specific waybill is not very material to, or probative of, the issues presented herein. Moreover, the truck driver testimony related to the question of whether livestock was storted en route so that the load received in the West would or could be different from the load as it left Texas. But, at this very same oral argument counsel for respondent, in effect, admitted that the weights listed on the invoices involved were "reasonable" weights or the "best" weights available which respondent manufactured *not* due basically to sorting. We conclude that it is not necessary to halt this proceeding at its final stage because of counsel's information as to possible perjury. This matter can be appropriately handled without such a halt.

We turn now to the difficult question of determining the sanction to be imposed upon respondent for the violations of the act found herein. Of course, respondent should be ordered to cease and desist from his violations of section 312(a) and to maintain his records in the manner required by the act. In addition, for the reasons stated in the *Boone* case, respondent should be suspended as a registrant under the act for a period of 6 months. These sanctions, by the agreement and stipulation of the parties, are also to apply to the corporation, Arnold Fairbank Cattle Co., Inc., which has succeeded to respondent's business.

The many contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with the decision are denied.

Order

Respondent, his agents and employees, and Arnold Fairbank Cattle Co., Inc., its officers, directors, agents and employees, directly or through any corporate or other device, with respect to their operations as registrants under

the act, shall cease and desist from: (1) selling livestock in commerce at false and incorrect weights; (2) issuing sales invoices in connection with the sale by respondent or Arnold Fairbank Cattle Co., Inc., of livestock in commerce showing weights other than the true and correct weights of the livestock without explanation thereon; and (3) collecting from purchasers of livestock sold by respondent or Arnold Fairbank Cattle Co., Inc., in commerce on the basis of false and incorrect weights.

Respondent and Arnold Fairbank Cattle Co., Inc., shall each keep such accounts, records and memoranda as fully and correctly disclose all transactions involved in their respective businesses under the act, including among others: (a) invoices received in connection with their respective purchases of livestock in commerce; and (b) an accurate record of the weight of livestock bought, sold, or otherwise disposed of each business day.

Respondent and Arnold Fairbank Cattle Co., Inc., are suspended as registrants under the act for a period of 6 months.

Except as to suspension, this order shall become effective on the 6th day after its date. The suspension ordered herein shall become effective on the 30th day after the date of this order.

Done at Washington, D. C.
November 1, 1968

THOMAS J. FLAVIN
Judicial Officer

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23705

ARNOLD FAIRBANK, an individual, doing business as ARNOLD FAIRBANK CATTLE COMPANY

and

ARNOLD FAIRBANK CATTLE CO., INC., a California corporation,

Petitioners

v.

ORVILLE FREEMAN, Secretary, United States Department of Agriculture, Washington, D. C.

and

UNITED STATES OF AMERICA, c/o The Attorney General, Justice Department, Washington, D. C.

Respondents

Motion for Leave To Adduce Additional Evidence

Come now the petitioners by counsel and move for leave to adduce additional evidence pursuant to the provisions of 28 USCA 2347(c) and in support of this motion petitioners respectfully show:

1. That during the administrative hearing petitioners, by counsel, moved for the issuance of a subpoena duces tecum to employees of the Department of Agriculture to require production of documents obtained by said employees during an investigation of the alleged transactions including documents and statements obtained from firms that sold live-

stock to petitioner and others connected with such transactions. Said motion was duly supported by affidavit (TR 464) but the hearing examiner arbitrarily denied the subpoena, TR page 16, and subsequent oral requests for such production were also denied, TR 172, 184, 187, 189, 192, 193, 212, 214, 218. Further requests for production of material identified by witnesses for the Government, TR 294, 521, 874, 895-909, and a request for a subpoena for the records of truckers were denied by the hearing examiner TR 952, 1001, 1003, 1036, 1046, 1073-1076, 1126, 1145, 1146, 1175, 1181.

The production of the above material was essential for the defense of petitioners including the impeachment of testimony of Government witnesses.

2. That the Hearing Examiner prior to and during the administrative hearing refused petitioners an opportunity to be heard on a motion for a declaratory order requested under the provisions of Section 5(d) of the Administrative Procedures Act, 60 STAT 237, 5 USCA 1004, questioning the validity of Sections 201.46, 201.49, 201.55 of the regulations under the Act (9 CFR 201.46, 201.49, 201.55) as applied to country livestock transactions, and further oral requests to renew the motion were denied, TR 7 and 14. Petitioners are entitled to a full hearing before the Department of Agriculture on the motion for a declaratory order.

3. That at the close of the administrative hearing in El Centro, California, on June 29, 1967, counsel for petitioners was advised by truckers who on that date were called as Government witnesses that said truckers did not testify truthfully. Counsel for petitioners immediately relayed this information to counsel for the Government, however, no steps were taken by the Department of Agriculture to correct the record. This matter was subsequently called to the attention of the Judicial Officer at the oral hearing on September 18, 1968, who also failed to take steps to correct the record. It is the duty of the Government to correct an erroneous record prior to issuing any decision and order.

Petitioners are advised by counsel and therefore believe and allege that (a) the documents requested before and at the hearing are essential, material, and relevant to the issues and petitioners are entitled to have such material produced for cross-examination of Government witnesses and to have such documents made a part of the record, (b) the issues raised by the declaratory order should be fully and fairly heard and Government witnesses fully examined as to the background and applicability of such regulations, and (c) the testimony of Government witnesses who stated they did not testify correctly should be corrected. Petitioners believe that the record in this proceeding, in all fairness to petitioners, should be re-opened and such additional evidence adduced and fully considered by the Department of Agriculture in connection with its findings of fact, conclusions, and order in P. and S. Docket No. 3683.

WHEREFORE, petitioners move this Honorable Court that this Court make and enter its order directing the Department of Agriculture to:

(a) Produce all documents obtained by the Government during its administrative investigation and afford petitioners an opportunity based upon such material to adduce additional evidence and testimony which was excluded by the hearing examiner.

(b) Permit petitioners to introduce into the record such additional documentary evidence.

(c) Permit petitioners to fully cross-examine Government witnesses as to the history and applicability of 9 CFR 201.46, 201.49, 201.55 as to country livestock transactions and give petitioners an opportunity to be fully heard on their motion for a declaratory order.

(d) Make all the additional evidence a part of the record in this proceeding.

(e) Correct the testimony of the truckers who failed to testify correctly.

(f) File with the Court any modified or new finding which it may make by reason of the evidence so adduced and made a part of said record and the recommendations, if any, for the modification or the setting aside of the order and file with this Court a statement regarding its recommendations as to such evidence.

(g) The Court grant to petitioners such other and further relief as this Court may so deem just and proper.

DONALD L. BOWMAN
Suite 202
135 Center Street, South
Vienna, Virginia

JOHN A. MORROW, JR.
Suite 109
Law Building
895 Broadway
El Centro, California

Attorneys for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,705

ARNOLD FAIRBANK, an individual, d/b/a
ARNOLD FAIRBANK CATTLE COMPANY

and

ARNOLD FAIRBANK CATTLE CO., INC.,
a California corporation,

Petitioners

v.

ORVILLE FREEMAN, Secretary, United States
Department of Agriculture, Washington, D. C.

and

UNITED STATES OF AMERICA, c/o The Attorney General,
Justice Department, Washington, D. C.

Respondents

Motion To Produce Documents Under Seal

Come now the Appellants (Petitioners) by counsel; and respectfully move the Court to require the Respondents to provide under seal to the Court:

All documents, statements, memoranda, tabulations or other documentary record, obtained by, prepared by, or available to Government witnesses, Watkins, Cortez and Sherman from the investigation of Arnold Fairbank, d/b/a Arnold Fairbank Cattle Company, including all work sheets, tabulations and audit material, and copies of documents of the cattle purchased and/or sold by Fairbank during the period January 1 through August 30, 1965, and all statements, memoranda, or summaries of interviews of other persons by employees of the U. S. Department of Agriculture relating to Fairbank's cattle operations, and being

material which was requested by Fairbank's counsel prior to or during the course of the Hearing which was excised from or otherwise not produced or made available to Fairbank's counsel.

The purpose of this Motion is to enable the Court to review the material withheld by the Government.

WHEREFORE, Appellant (Petitioners) respectively moves this Honorable Court to enter an Order directing the U. S. Department of Agriculture to certify said material to the Court under seal.

/s/ DONALD L. BOWMAN
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JOHN A. MORROW, JR.
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Counsel for Appellant
(Petitioners)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23705

ARNOLD FAIRBANK, an individual, d/b/a
ARNOLD FAIRBANK CATTLE COMPANY

and

ARNOLD FAIRBANK CATTLE CO., INC.,
a California corporation,

Petitioners

v.

ORVILLE FREEMAN, Secretary, United States
Department of Agriculture

and

UNITED STATES OF AMERICA

Respondents

Response of Petitioners to Respondents' Opposition to Petitioners' Motion To Produce Documents Under Seal

DONALD L. BOWMAN
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El Centro, California

Attorneys for Appellant
(Petitioners)

Respondents' opposition to Fairbank's motion to produce documents under seal completely ignores the large volume of investigative material held by the Government relating

to Fairbank's cattle transactions during the period January through August 1965, which during the administrative proceeding counsel for the Government and the Hearing Examiner refused to make available to Fairbank's counsel for cross-examination and impeachment purposes. The production of such material was identified and timely requested on behalf of Fairbank prior to the Hearing and during the Hearing to enable counsel for Fairbank to prepare for the Hearing and to cross-examine Watkins and other Government witnesses.

Petitioners' motion to produce documents under seal is directed not only to the excised material, but also to all the Fairbank investigative material in the possession of the Government, which the Government still declines to produce. The record in the administrative proceeding identifies the material requested and shows the Government's refusal to produce such material.

On October 28, 1966, prior to the first Hearing in El Centro, California, on November 29, 1966, Fairbank's counsel filed a motion to inspect and copy the information in the Government's files relating to the entire investigation of Fairbank. This motion was denied by the Hearing Examiner on November 9, 1966.

Counsel for Fairbank, at the start of the Hearing on November 29, 1966, orally renewed the motion to inspect and copy all of the material in the Government's investigative reports to prepare for the defense of Fairbank, and the motion was denied; whereupon, counsel moved for the issuance of a subpoena duces tecum to Fullerton, counsel for the Government, Brinckmeyer, Sherman, Freeze and Watkins, all employees of the Government and present in the hearing room, to produce all documents, books and papers obtained in the investigation of Fairbank, including all documents, statements taken from firms from whom Fairbank purchased livestock and from those to whom Fairbank sold livestock. Also, all truckers, handlers of livestock, operators of rest stops, feed yard facilities, and re-

ceiving stations used in the transportation, feeding, holding, inspection by Government officials or otherwise, and handlers involved in the handling of livestock in any way for or in behalf of Fairbank, and counsel cited authorities to the Hearing Examiner in support thereof (TR 16-18), but the subpoena was refused.

Watkins, employee of the Packers and Stockyards Division, USDA, the first witness for the Government, testified (TR 33) he audited the books and records of Fairbank for the period from January 1, 1965 through September 13, 1965, and he analyzed the records of Fairbank; and, over the objection of Fairbank's counsel, testified that his analysis revealed that Fairbank was purchasing cattle and shipping cattle from Texarkana and later re-billing these cattle to various feed lots in California at greater weights than those purchase weights. Watkins also stated he was familiar with the entire Fairbank investigative report and it contained documentary evidence which was not obtained from Fairbank's records (TR 51), and he had knowledge of the complete investigation of Fairbank.

Watkins testified, TR 124, that during the investigation he inquired of the buyers as to their understanding relating to their purchase weights; and over objections, Watkins was permitted to summarize what the buyers stated. In ruling on the objection, the Hearing Examiner stated "that the making of an investigation is one of the exceptions to the hearsay rule", and the Examiner permitted Watkins to give prejudicial testimony based on Watkins' knowledge of the investigation, but refused to make that investigation available to Fairbank for cross-examination and for impeachment purposes.

Watkins testified at TR 142 that Fairbank explained to the investigators that there was regrouping of his livestock en route, and officials of the Packers and Stockyards Division conducted an investigation of this contention. Over counsel's objections, Watkins was permitted by the Hearing Examiner to testify what the investigation report

showed relating to the regrouping. Watkins also testified that the investigation of the regrouping included a review of the records of different truckers (TR 150).

At the close of the first day of the Hearing, counsel for Fairbank again requested production of the investigative material and pointed out that Watkins had testified regarding the investigation of Fairbank's operations at other points by employees of the Government; and counsel requested the production of this investigative material so that counsel would be in a position to cross-examine Watkins, and that this was the same material which had been requested in the written memoranda to inspect and copy, and the renewal for that request, and the request for a subpoena duces tecum. Production was again denied by the Hearing Examiner (TR 173).

Counsel for Fairbank again requested that the investigative material be made available for the purpose of cross-examining Watkins (TR 207-208), which was denied by the Hearing Examiner.

Watkins testified, TR 179-182, that the Government's investigation revealed that Fairbank's livestock marketing practices were unfair and deceptive, but counsel for Fairbank was denied access to the investigative material available to Watkins for the purpose of cross-examining Watkins and for impeachment of Watkins testimony (TR 187). Fairbank's counsel was prohibited by the Hearing Examiner from inquiring of Watkins as to statements, memoranda or interviews made by other employees of the Government in the Fairbank Investigation, even though Watkins was permitted to testify what their investigation showed (TR 202, 207-208, 211, 212).

Counsel for Fairbank, at TR 202-207, attempted to cross-examine Watkins as to the material obtained by Government officials in their investigation of rest stops which handled Fairbank's cattle during the period from January 1965 through August 1965. Counsel for the Government

objected to any inquiry as to the investigation of rest stops and specifically at Casa Grande, Arizona. To facilitate the Court's review of pages 202-207, of the transcript, said pages are attached hereto as Appendix 1.

Also attached as Appendix 2 is a copy of a certified letter dated December 16, 1965 from Mr. Brinckmeyer, the Packers and Stockyards Area Supervisor, to Mr. Jack Busby, the operator of the rest stop at Casa Grande, Arizona, which reveals the extent of the Government's investigation of Fairbank at the rest stops and establishes as a fact the Government did obtain documentary material from the rest stop operators, which was withheld during the Hearing. Fairbank's motion to produce documents under seal to this Court is directed to all the material obtained by the Government investigators, including the material obtained from the rest stop operators such as Casa Grande, and this material is not a part of the administrative record.

Watkins testified the Government considered Fairbank's entire operations in its investigation; the George West, Texas transactions were investigated, and he (Watkins) made an audit of Fairbank's complete records, and he did not disregard the George West transactions, and Fairbank's whole operations were considered (TR 228, 299).

Ralph O. Williams, marketing specialist employed by the Packers and Stockyards Division, was called as a witness for the Government, and he testified he interviewed Eugene Allen, Jimmy Lee Paris, Dan Dagley, O. C. Lane, Jr., Albert Beach, James Tennyson and Bobby D. Leach. Fairbank's counsel objected to his testimony and requested an opportunity to examine all statements and the notes of any interviews of truckers (TR 556, 567, 571-575), and this request was denied.

On January 27, 1967, counsel for Fairbank filed a motion to require the Government to furnish 30-days in advance of any further hearing the names and addresses of all additional witnesses, specify the precise manner in which the witnesses were involved, the dates, specific livestock in-

volved, point of shipment and unloading point. Fairbank's counsel also filed a request to inspect and copy all statements of prospective additional witnesses, all summaries, written statements, notes or other information, and to inspect and copy all books, papers, documents and tangible objections which related to any transactions which the Government intended to adduce "additional testimony."

On February 21, 1967, counsel for Fairbank filed an Affidavit for a subpoena duces tecum to Donald A. Campbell, Director of the Packers and Stockyards Division, requesting a list of the names and addresses of all truckers who hauled livestock for Fairbank during the period from January 4, 1965 through August 25, 1965, a list or tabulation identifying the particular loads hauled by each trucker, the statements of the truckers, and the written summaries or notes prepared by the Government agents who interviewed the truckers hauling for Fairbank during the aforementioned period, such material being evidentiary items for impeachment purposes.

On June 15, 1967, counsel for Fairbank filed another Affidavit for a subpoena duces tecum prior to the Hearing on June 28, 1967 and an additional request for a motion to inspect and copy prior to the Hearing.

At the resumption of the Hearing on June 28, 1967, Fairbank's counsel pointed out that Watkins in the previous Hearing had identified specific material in his investigative report "letters C to O and P to S", which consisted of Affidavits, statements, interviews, notes and letters of interest (TR 890, 899) and Fairbank had filed an Affidavit for a subpoena duces tecum for all of those items on February 21, 1967 and renewed the request for a subpoena duces tecum on June 13, 1967, all of which was denied by the Hearing Examiner.

Subsequently, counsel orally again renewed his request for the documents identified by Watkins in his audit and renewed his request for a subpoena duces tecum (TR 1043-1047).

Other Government witnesses also referred to this material, which was withheld and which was not made available to counsel for Fairbank for the cross-examination of such witnesses. Cortex testified that he assisted Watkins in his audit and that the drafts from George West, Texas were available, and there were a large number of transactions involving cattle from George West, Texas, and they attempted to correlate some of those purchase drafts with the sales invoices (TR 827-834). Also, Sherman, chief auditor for the Government who testified that in his opinion Fairbank's operations were violative of the Act, stated he based his statement upon his review of the investigative report in Washington. Counsel for Fairbank strenuously objected to such testimony because the investigative report had not been made available to Fairbank's counsel (TR 877-878).

Counsel for Fairbank has discussed with Government officials Respondents' opposition to the motion to produce documents under seal and has now discovered for the first time that documents which were obtained by, prepared by, or available to Government witnesses are not a part of the administrative record and have not been certified to this Court. Also, material relating to Fairbank's cattle out of George West, Texas was withheld by Watkins in the Los Angeles office.

On March 18, 1970, Raymond Fullerton, Esquire, Office of the General Counsel, United States Department of Agriculture, stated that he has now ascertained that Watkins has in his possession certain documents prepared in connection with the audit of Fairbank during the period January through August 1965 and that said documents had not been produced or certified to the Court, and the Government was declining to do so on the grounds that the documents are irrelevant.

Also, the Government disclosed for the first time, when it filed with this Court the Inspector General's report dated

December 23, 1968, attached to the Supplemental Brief of Respondents, on Page 2 of that Report, that Ralph O. Williams, an employee of the Department of Agriculture at Fort Worth, Texas, conducted an extensive search of records of various trucking operators in the State of Texas, and interviewed 30 or 40 truck drivers taking affidavits from many of them. Also, Williams stated he had obtained a broad scope of the operations of Arnold Fairbank Cattle Company through examination of drivers' logs, weigh bills and weight tickets, after discussing the pertinent tickets with the drivers involved in the loads these records related to.

The Government refused to produce at the Hearing any of this investigative material, except the Affidavits of drivers who testified. Fairbank's counsel requests that all of the material obtained by Williams or other Government officials in their interviews with the other 25 or 35 truck drivers be certified to the Court to enable the Court to review the material withheld by the Government.

WHEREFORE, counsel for Fairbank respectfully moves the Court to require the Government to produce to the Court, under seal, all documents, statements, memoranda, tabulations or other documentary records obtained by, prepared by, or available to Government witnesses.

Respectfully submitted,

/s/ DONALD L. BOWMAN
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135 Center Street, South
Vienna, Virginia 22180

JOHN A. MORROW, JR.
Suite 109, Law Building
895 Broadway
El Centro, California

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 1970, I served the foregoing Response of Petitioners to Respondents' Opposition to Petitioners' Motion to Produce Documents Under Seal, upon counsel for the Respondents by mailing a copy, postage prepaid, to Alan S. Rosenthal, Esquire, Department of Justice, Washington, D. C. 20530, and to Raymond W. Fullerton, Esquire, Department of Agriculture, Washington, D. C. 20250.

/s/ DONALD L. BOWMAN
Donald L. Bowman
Attorney for Petitioners

APPENDIX 1

[202] A. No, sir.

Q. Now, Mr. Watkins, is there anyone else—did you interview anyone at any rest stops anywhere? A. Other than those two that I've named you, no, sir.

Q. Were you with anyone at any of the other rest stops where they interviewed anyone? A. No, sir.

Q. Were you at Casa Grande? A. No, sir.

Mr. Fullerton: Mr. Examiner, Complainant objects. Respondent is being very redundant now. The witness has answered the question in at least three ways.

Mr. Bowman: Mr. Examiner—

Examiner Bain: Wait. Let him make his objection.

Mr. Fullerton: The witness has answered the question in three ways, and further negative answers will not implement this proceeding.

Mr. Bowman: May I respond now, Mr. Examiner?

Examiner Bain: Yes, sir.

Mr. Bowman: I think, counsellor, that I have a right to inquire of any and all statements, any interviews, that were made for the purpose of cross-examining this witness and he is very careful to not give me the information as to these items.

Mr. Fullerton: Counsellor, you're testifying now, [203] rather than arguing.

Mr. Bowman: I'm explaining why I have the right to inquire into this.

Mr. Fullerton: Counsellor, I understand fully that you have an absolute right to make inquiry. I am not in any way objecting to inquiry.

After inquiry has been made and answered three times, I am of the opinion that we get redundant.

Mr. Bowman: May I proceed?

Examiner Bain: Yes, sir, go ahead.

Mr. Fullerton: Excuse me, Mr. Examiner. May I have a ruling on the objection to further questioning regarding the last answered question.

Mr. Bowman: If I recall, the last question was in connection with Casa Grande.

Mr. Fullerton: Yes, sir.

Examiner Bain: What was the answer, that you went to Casa Grande?

The Witness: No, sir. I did not.

Examiner Bain: That's enough, isn't it?

By Mr. Bowman:

Q. Did anyone go to Casa Grande to take a statement?

Examiner Bain: Now, to cross-examine this witness, it must be on what he did, not what somebody else did or what somebody else wrote or some statement somebody else took.

[204] Mr. Bowman: Mr. Examiner—

Examiner Bain: That's all right: You're just wasting time on that.

Mr. Bowman: Mr. Examiner, I'd like to point out that you permitted this witness to testify to what everybody else in the Packers and Stockyards Division did, where they went and who they interviewed, and all I'm trying to find out is if a statement was taken from a man at Casa Grande.

Examiner Bain: If a statement was taken from a man at Casa Grande, that statement is not to be turned over to you unless and until and after that man has testified.

Mr. Bowman: Mr. Examiner, I do not believe that that is a correct ruling.

Examiner Bain: That's the ruling that's going to be applied in this proceeding.

Mr. Bowman: I understand that—

Examiner Bain: All right. You don't need to ask any more. If I'm wrong, you've got me wrong right now.

Mr. Bowman: Mr. Examiner, then you refuse to let me inquire further as to Casa Grande at this point?

Examiner Bain: He has said he didn't go to Casa Grande, hasn't he—twice?

Mr. Bowman: My next question is did anyone from the Los Angeles office go to Casa Grande?

Mr. Fullerton: Complainant objects to the question [205] on the grounds that the witness has not testified about that matter.

Examiner Bain: Did you, in your direct—

Mr. Bowman: Mr. Examiner—

Examiner Bain: Wait a minute.

Did you, in your direct testimony, talk about Casa Grande?

The Witness: No, sir.

Examiner Bain: Objection sustained.

Mr. Bowman: Mr. Examiner, I might call the attention of the Examiner that this witness did testify that based upon what their investigation disclosed at the rest stops, the statements that Mr. Fairbank told him were not correct.

Mr. Fullerton: Mr. Examiner, I don't believe that the witness mentioned Casa Grande at all during his direct testimony.

Mr. Bowman: He mentioned rest stops. Casa Grande is one of them, Mr. Fullerton. You can't avoid that.

Mr. Fullerton: Mr. Bowman, there are rest stops all over the United States. I don't know how many exist, but we could spend an infinite amount of time discussing each and every rest stop that existed in 1965.

Mr. Bowman: Counsellor, if you had made the material available on the request to inspect and examine prior, we wouldn't be going into it now, but I'm trying to [206] find out if a statement was made at Casa Grande.

May I inquire?

Examiner Bain: The objection is sustained.

Mr. Bowman: Note my exception.

Examiner Bain: Yes, sir.

Mr. Bowman: Does that limit me as to all rest stops?

Examiner Bain: That he did not go to personally and take notes.

By Mr. Bowman:

Q. Did you go to any rest stops? A. The rest stop in Yuma, Arizona.

Q. And who was the operator there? A. Mr. Headstream.

Q. That's the one you testified about? A. Yes, sir.

Q. Any others? A. Los Angeles Livestock Market.

Q. Is there a cattle stop at the Los Angeles Livestock Market? A. Yes, sir.

Q. Is that all the rest stops? A. That I went to?

Q. Yes, sir. A. Yes, sir.

Q. All of your testimony, then, in connection with rest [207] stops is based upon Casa Grande and Los Angeles; is that right? A. The ones that I interviewed, yes, sir.

Q. You have no knowledge of anything at any other rest stop? A. I had knowledge of the complete investigation.

Mr. Bowman: Mr. Examiner, he says he has knowledge of the complete investigation, and he based his testimony upon that investigation; so I'd like to have that investigation made available.

Mr. Fullerton: Mr. Examiner, Complainant has already made the investigation available.

Mr. Bowman: Mr. Fullerton, you have not made the investigation available. You have only made portions of it available. And I'm trying to find out what was made.

May I go into the investigative report made by others at rest stops?

Examiner Bain: No, sir.

Mr. Bowman: Now, may I have all of these documents that he has identified here?

Mr. Headstream, Mr. Sam Reyes, Tom Abbott—

Mr. Fullerton: Excuse me, sir. I missed the name. Tom . . .

Mr. Bowman: Mr. Headstream, Mr. Delfino, Sam Reyes, R-e-y-e-s, Tom Abbott, Walter Scoog, Virgil Terrance, Jack Wilkerson (phonetic).

APPENDIX 2

UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE
PACKERS AND STOCKYARDS DIVISION
5905 PACIFIC BOULEVARD
HUNTINGTON PARK, CALIFORNIA 90256
16 December 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Jack Busby
Route 2, Box 86
Casa Grande, Arizona

Dear Mr. Busby:

As requested on December 6, 1965, we are enclosing a copy of your statement.

We would appreciate it if you would mail the tickets issued to K. J. Smith, LeRoy Beach, and Eugene Allan on cattle fed and rested in your yards from January 1, 1965 to August 31, 1965, so we can make photocopies of them. After we have made photocopies of the tickets, we will return them to you.

For your convenience in mailing the tickets, we are enclosing a self-addressed envelope.

Your cooperation in furnishing this office with the above tickets will be appreciated.

Very truly yours,

/s/ JACK W. BRINCKMEYER
Jack W. Brinckmeyer
Area Supervisor
Packers and Stockyards Division

KDF/kah
Enclosure (1)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,705

ARNOLD FAIRBANK, d/b/a ARNOLD FAIRBANK CATTLE COMPANY, ET AL., *Petitioners*

v.

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, ET AL., *Respondents*

Affidavit

STATE OF VIRGINIA
COUNTY OF FAIRFAX, to wit:

Comes now DONALD L. BOWMAN, who being duly sworn deposes and says:

On June 28 and 29, 1967 at the second stage of the Fairbank hearing in El Centro, California, the Hearing was concluded at approximately 12:00 noon on June 29; whereupon, the Affiant, Mr. Arnold Fairbank and Mr. K. J. Smith went to Brunners Motel restaurant, approximately five (5) blocks from the Court House in El Centro, California for lunch.

At the restaurant, four (4) truck drivers, Messrs. Paris, Icke, Laumer and Dagley, witnesses for the United States Department of Agriculture, were present; and at the invitation of Mr. Fairbank they joined us for lunch. A large table was obtained for the group in a separate dining room.

Shortly after being seated, one of the truckers on my right, Mr. Dagley, turned to me and said, "You really had me crossed up in my testimony." Whereupon I inquired as to what he meant, and he stated, "I didn't exactly tell the truth. For instance, you cross-examined me in regard to the load of cattle out of Garland, Texas and that testi-

mony was incorrect. In fact, I never was in Garland, and I don't know if they have cattle pens in that town."

Upon my further inquiry as to why he so testified, Dagley explained that they frequently do not have two (2) drivers as required by I.C.C. regulations on the trucks, and they do not make out the log until after the trip is over; and frequently it is made out by a person who wasn't even on the truck; and in that particular transaction involving the log book relating to the Garland, Texas cattle, he (Dagley) was not present and his testimony was incorrect. I expressed shock that he had testified falsely; whereupon, the other drivers stated that in many of their transactions they were in the same position, and their testimony was incorrect, without elaborating or identifying the transactions.

Following the luncheon, the seriousness of this false testimony was discussed with my client, Arnold Fairbank. It was decided that since the witnesses had been called by the Government, I would advise Raymond W. Fullerton, Esq., Office of the General Counsel, United States Department of Agriculture, trial counsel for U.S.D.A., of the false testimony upon my return to my office in Vienna, Virginia. I returned on the night of June 29, 1967, and the week end was followed by the Fourth of July holiday. Upon returning to my office the next week, I placed a telephone call to Raymond Fullerton, Esq., Telephone Number DU 8-2866, and upon reaching Mr. Fullerton I advised him fully of the above details regarding the incorrect testimony; and I stated that since these witnesses were called by the Government, the matter should be checked out by the Government and the record corrected. Mr. Fullerton indicated he was in agreement. Therefore, the matter of false testimony was left in the hands of Government counsel as to what action should be taken to correct the record.

DONALD L. BOWMAN
Donald L. Bowman

Subscribed and sworn to before me this 25th day of February, 1970.

MARY E. TARKIR
Notary Public

My Commission Expires:
5/3/71

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,705

ARNOLD FAIRBANK, d/b/a ARNOLD FAIRBANK CATTLE COMPANY, ET AL., *Petitioners*

v.

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, ET AL., *Respondents*

Affidavit

STATE OF CALIFORNIA,
COUNTY OF IMPERIAL, to-wit:

Comes now ARNOLD FAIRBANK, who being duly sworn deposes and says:

On June 29, 1967 I invited Messrs. Parris, Icke, Dagley and Lamar, truckers who had just testified in a case against me, to join me, my counsel Donald L. Bowman and K. J. Smith at lunch. At that luncheon Dan Dagley stated to Mr. Bowman that he had testified incorrectly as to loading cattle out of Garland, Texas and that he was not in Garland. Mr. Bowman expressed concern and inquired as to the reason, and Mr. Dagley explained that on many loads the truck logs were made out by someone who was not even on the trip. This was due to the fact only one driver

was on the truck rather than the required two (2). The other truckers, Parris, Ieke and Lamar, stated that their testimony was similar, and that they had the same problem but they did not name the transactions.

Subsequent to that luncheon, I discussed the incorrect tesimony of the truckers with my counsel, who stated he had fully advised Mr. Raymond Fullerton by telephone of the statement of the truckers at that luncheon, and Mr. Fullerton was looking into it.

ARNOLD FAIRBANK
Arnold Fairbank

Subscribed and sworn to before me this 16th day of February, 1970.

ELLEN B. BERBLINGER
Notary Public

My Commission Expires:
June 19, 1970

Affidavit of Lee D. Sinclair

DISTRICT OF COLUMBIA, ss:

Lee D. Sinclair, being first duly sworn upon oath, deposes and says:

That affiant during the period from on or about April 2, 1958 to November 27, 1960 was the Deputy Director of the Liverstock Division of the United States Department of Agriculture and from on or about November 27, 1960 to November 5, 1961 was the Deputy Director of the Packers and Stockyards Division of the United States Department of Agriculture.

That at all times during the above period affiant was in charge of, and responsible for, the administration of the Packers and Stockyards Act, 1921, as amended and sup-

plemented (7 U.S.C. 181 et seq.) hereinafter referred to as the Act, and the regulations issued thereunder by the Secretary of Agriculture (9 CFR 201.1 et seq), hereinafter referred to as the regulations.

That on September 2, 1958, the Packers and Stockyards Act was amended by Public Law No. 85-909 (H.R. 9020) and this amendment extended the jurisdiction of the Department of Agriculture under the Act for the first time to country livestock transactions. Prior to that date livestock transactions at posted stockyards were subject to the provisions of the Act but country livestock transactions were not subject to the Act. This amendment was passed following extensive hearings in Congress and upon the passage of the amendment officials of the Department realized the regulations, which had been promulgated under the Act in 1954, were based solely on livestock transactions at posted stockyards, and the regulations did not take into consideration livestock marketing practices followed in country transactions, i.e., away from posted stockyards. At posted stockyards scales are available to weigh the livestock at the time of sale; however, in country transactions scales frequently are not available at the time of sale. Following the amendment to the Act the Department proceeded to make technical changes in all regulations to prevent conflicts between the Act and the regulations. The livestock industry was advised at that time technical changes would be made in the regulations without public hearings and thereafter the Department would study the regulations as applied to the new jurisdiction to determine if new regulations should be promulgated or if revisions or changes should be made in the regulations as a result of the jurisdictional changes brought about by the 1958 amendment.

Beginning 1959, members of the livestock industry in conversations and in conferences with me and other officials of the Department, discussed the Department's interpretations of several regulations as applied to country trans-

actions, including Sections 201.46, 201.49 and 201.55 of the regulations. I recall that the Galesburg Order Buyers and the National Independent Meat Packers and the National Livestock Dealers Association were parties to such discussions. These industry members pointed out to the officials of the Department how livestock marketing practices differ in country transactions from those at posted stockyards and a strict interpretation of the regulations, which were based on stockyard transactions, would be oppressive and unfair to operators in country transactions. It was agreed that the Department would immediately proceed to study the methods used in country transactions in the livestock industry and following the study the Department would prepare and present to the industry suggested changes or revisions of the regulations or if required new regulations would be proposed which would be applicable to country transactions. Also it was agreed that public hearings would be held and the livestock industry would be given ample opportunity to comment on any proposed changes before they were effective. I, and other Department officials, agreed that during the time the studies were underway, the Department would not take formal action in country transactions based upon technical violations of the regulations. Also, after the studies were completed, the livestock industry would be duly notified as to any changes required in the books and records and the procedures followed in country livestock transactions subject to the provisions of the Act. Thereafter studies of country transactions were initiated by the Packers and Stockyards Division, However, during the period I remained with the Department final decisions on the matters involved had not been reached.

The amendment to the Act in 1958 opened up a vast new area in the administration of the Act and brought before the Department for consideration for the first time new and major livestock marketing problems found only in country transactions. These problems included, but were

not limited to, such practices as pencil shrink, pro-rating weights, estimated weights, western weights, and the use of various formulas and procedures to calculate weights in the purchase or sale of livestock. The discussions between the members of the livestock industry engaged in the purchase and sale of livestock in country transactions and Department officials in 1959 were made in good faith by all parties in a sincere attempt to find a reasonable and practical method to extend the provisions of the Act, as amended, to country transactions and to give all country operators adequate notice as to any changes required in their operations and in the maintenance of their books and records.

Further, affiant sayeth not:

s/ LEE D. SINCLAIR
Lee D. Sinclair

Subscribed and sworn to before me this 16th day of May, 1966.

s/ LOUISE G. BURROUGHS
Notary Public, D. C.

My Commission expires
September 30, 1970

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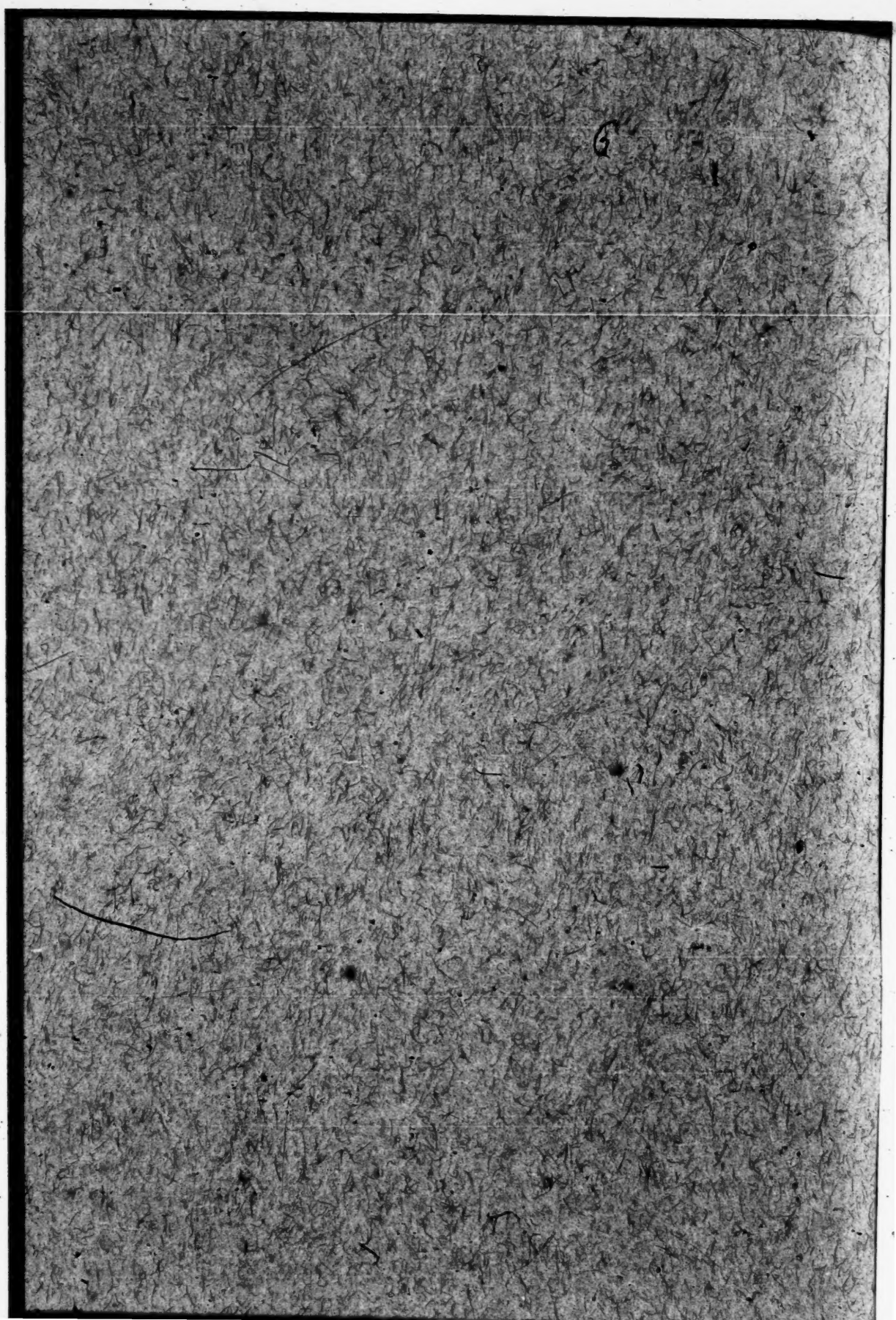

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 689

ARNOLD FAIRBANK, d/b/a ARNOLD FAIRBANK CATTLE COMPANY, ET AL., PETITIONERS

v.

CLIFFORD H. HARDIN, Secretary of Agriculture, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-8a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1970. A timely petition for rehearing was

denied June 17, 1970. The petition for a writ of certiorari was filed on September 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Secretary's determination that petitioners violated the Packers and Stockyards Act.

2. Whether, in the circumstances of the case, petitioners were afforded due process.

STATEMENT

This action challenges a decision, rendered in connection with a disciplinary proceeding brought by the Secretary of Agriculture, that petitioners willfully violated Sections 312(a) and 401 of the Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 213(a) and 221, and several regulations promulgated thereunder.

Petitioners were livestock dealers engaged in the business of buying and reselling cattle for their own account. The Department of Agriculture's Judicial Officer found that on 50 separate occasions, over an eight month period, petitioners knowingly sold cattle to various customers at false and incorrect weights, calculated by adding an arbitrary number of pounds to the weights at which petitioners had purchased the particular cattle (Pet. App. 22a-26a). The Judicial Officer also found that in conducting the transactions at issue, petitioners purported to adhere to the local

custom of selling livestock at the purchase weight (Pet. App. 22a). According to the Judicial Officer, petitioners depended on the assumption on the part of the various purchasers that the incorrect weights at which they sold the cattle were the purchase weights (Pet. App. 31a); in fact, the livestock sold on each occasion weighed substantially less than the weights they represented (Pet. App. 23a-26a).[1] In all, petitioners were able to inflate the actual purchase weight of 5,000 animals sold in these transactions by 77,531 pounds, and to collect an additional $16,814.98 from the purchasers (Pet. App. 2a).

The Secretary's complaint was issued after an audit of petitioners' records. It was based, in part, on regulations promulgated in 1958, which made the practices with which petitioners were charged unlawful. Initially, petitioners sought to have these regulations amended or repealed on the ground that they were unresponsive to existing conditions in the livestock industry (Pet. App. 11a-14a). When the Secretary denied this motion (Pet. App. 14a-15a) prior to the hearing, petitioners moved for production of the Secretary's entire investigatory file relating to the charges lodged against them (Pet. App. 16a-17a). This motion, too, was denied.

An evidentiary hearing was held before a department hearing examiner. The government adduced what the Ninth Circuit described as "voluminous proof" in support of the charges (Pet. App. 3a). In

[1] Weight losses in transit reduced the livestock weight at its final destination to less even than its weight at petitioners' purchase (Pet. App. 22a, 27a).

response to petitioners' request, they were furnished with those parts of the Secretary's investigatory file that related to the testimony of government witnesses (Pet. App. 6a), to assist them in cross-examination (See, *e.g.*, Tr. 184-185, 211-212, 351, 365-366, 454-455, 484, 944-945). The hearing examiner found that the portions not furnished to petitioners were not relevant to the testimony given at the hearing.

Before the court of appeals, petitioners claimed that, immediately after the conclusion of the evidentiary hearing but before the hearing examiner's proposed decision, they had discovered evidence that the testimony given against them by several rebuttal witnesses was perjured (Pet. App. 39a). The court refused to reopen the record to receive evidence of this charge. Petitioners had not made the claim before the hearing examiner; indeed, they did not assert it until their oral argument before the department's Judicial Officer, approximately 15 months after they had the information upon which the claim rested.[2] It was only after the case was in the court of appeals that petitioners specifically identified the allegedly perjured testimony (Pet. App. 38a-41a, 59a-60a).

On the basis of the evidence at the hearing, the Judicial Officer found that petitioners had willfully violated 7 U.S.C. 213(a) and 221 and 9 C.F.R. 201.46, 201.49 and 201.55 by (1) selling livestock at false weights, issuing invoices and collecting payments on

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[2] The Judicial Officer found that, even if petitioners' unsupported assertions of perjury were true, the "conclusions [that petitioners had violated the Act] would be unaffected" (Pet. App. 35a).

false weights; and (2) failing to keep accurate records required by the Act. He suspended petitioners' registration under the Packers and Stockyards Act for six months, and also entered a cease-and-desist order.

The Ninth Circuit affirmed, holding that the "record * * *, beyond doubt, supports the findings of the [Judicial Officer]" (Pet. App. 3a). Upon reviewing the investigatory file *in camera*, the court also held that petitioners had been given every statement, record, and document in the Secretary's possession to which they were entitled under the Packers and Stockyards Act or the Constitution. It found that the portions of the file withheld from the petitioners were irrelevant to the testimony given at the hearing, and thus were properly excised by the hearing examiner. The court also found that the regulations involved were valid.

ARGUMENT

1. There is no occasion to review the court of appeals' factual determination that the Judicial Officer's findings are supported by substantial evidence (Pet. 16-18).

2. Similarly, petitioners' contentions that they have been denied due process raise no issue warranting review. When petitioners claimed a right to inspect the entire contents of the Secretary's investigative report, the court of appeals itself reviewed the file and concluded that the material withheld from petitioners did "not relate to the subject matter of the testimony of the witness purporting to make the statement" (Pet. App. 6a). Accordingly, *Jencks* v. *United States*, 353 U.S. 657, is inapplicable.

3. Petitioners' allegations of perjury stand on no better footing. Although petitioners claimed to have learned of the alleged perjury immediately subsequent to the conclusion of the evidentiary hearings (Pet. App. 57a-59a), they waited until the last moment before raising the issue in the administrative proceedings, frustrating any administrative consideration of the matter.[3] This factor distinguishes the case from *Communist Party* v. *Control Board*, 351 U.S. 115, where this Court found that the basis for challenging the allegedly perjurious testimony did not arise until after the conclusion of the administrative proceedings. 351 U.S. at 125. In these circumstances, the court of appeals did not abuse its discretion under 7 U.S.C. 194(f) by refusing to order the hearing reopened for the reception of further evidence.

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[3] The Office of the Inspector General of the Department of Agriculture did investigate the possibility of perjury after petitioners had made their claim in oral argument before the Judicial Officer. It did so even though it was the Judicial Officer's understanding at the time that petitioners did not want any further investigation (Pet. App. 35a). The Inspector General's report to the Secretary concludes that there was no reason to believe that any of the rebuttal witnesses gave false testimony. In light of this report, which was filed during the proceedings in the court of appeals, there was no occasion for the Secretary to correct the record.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

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